Supreme Court, U.S.
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NO.

In The
Supreme Court Of The United States

ALLEGRETTI & COMPANY,

Petitioner,

vs.

COUNTY OF IMPERIAL, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The Court of Appeal of the State of California,
Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Imperial County concededly was without jurisdiction to regulate the quantity of water that Petitioner could pump from beneath its own land to irrigate its own farm. Nonetheless, the county insisted that it would not allow even the repair of a damaged well unless Petitioner agreed to forego its rights to future withdrawals of the water underlying its land. Such access is acknowledged by State law as a property right.

The questions presented are:

1. When property owners' right of access to water beneath their own land is substantially abrogated by a government agency, is the resulting taking measured by regulatory taking standards (as held below) or is it more aptly "characterized as a physical invasion" (as held in a decision of the U.S. Court of Federal Claims, applying *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978])?

2. When regulatory action denies property owners the use of the substantial bulk of their land by denying them use of their own water rights – necessary for irrigation in the arid California climate – has there been a denial of "all economically viable or productive or beneficial use" even though a small portion of the land can still be used? Does such a denial unconstitutionally interfere with the owners' "distinct, investment-backed expectations" for use of the land which is, and always has been, agricultural? What are the standards for litigating each issue?

PARTIES TO THE PROCEEDING

All parties are listed in the caption.

Petitioner has no parent companies or wholly-owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Allegretti & Company respectfully prays that a Writ of Certiorari issue to review a final judgment of the Court of Appeal of the State of California, Fourth Appellate District, Division One.

OPINIONS BELOW

The decision was filed on March 28, 2006. Initially not certified for publication, the Court of Appeal responded to numerous requests from State and National organizations explaining the national importance of the opinion – and their desire to cite it to other courts around the country – and ordered the opinion published. (The publication Order is at App., p. 32.) It is now reported as *Allegretti & Company v. County of Imperial*, 138 Cal.App.4th 1261, 42 Cal.Rptr.3d 122 (Cal. App. 2006). (App., p. 1.) The California Supreme Court denied review on July 26, 2006. (App., p. 49.) The unpublished Opinion of the California Court of Appeal on an earlier appeal in this same case is at App., p. 34. The trial court's order reviewed on appeal is unpublished and is at App., p. 43.

JURISDICTION

The California Supreme Court denied Petitioner's timely petition for review on July 26, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides in part: ". . . nor shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: ". . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."

Pertinent provisions of County law appear at App., pp. 40-42.

STATEMENT OF THE CASE

Petitioner Allegretti & Company purchased 2,400 acres of farmable property in Imperial County, California, in 1981.[1] The property overlay water-rich aquifers, meaning that the land could be irrigated with its own water, without the need or expense to import it.[2] The County lacked jurisdiction to regulate the *amount* of water that could be extracted, and Allegretti needed only to obtain well construction permits from the County.

Allegretti leased the land to a successful Imperial Valley farmer, but the existing wells were not adequate to irrigate the entire farm. Only 800 acres (sometimes less) of the 2,400 acre farm could be irrigated by the existing wells.

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1 The 2,400 acres was left from an original purchase of 4,368 acres. Non-farmable property on the northern and southern sides had been transferred to either the State or Federal government.

2 The nearest connection to the local water utility was nine miles away, making access both difficult and expensive.

But the County opposed Allegretti's attempt to obtain a construction permit to re-open an existing well. Instead of dealing with the construction issues that were within its power (see App., p. 39), the County purported to place restrictions on Allegretti's ability to pump water for use on its own land. In so doing, the County made clear that it would not permit Allegretti to extract sufficient water from beneath its own land to irrigate that land for farming.

On an earlier appeal, the Court of Appeal held that the County lacked jurisdiction to regulate the amount of water that Allegretti could pump (App., p. 38) and the matter was remanded for trial of Allegretti's taking claim.

The uncontradicted testimony of the experienced farmer who leased the Allegretti land showed that the rent received by Allegretti was substantially lower than similar farm land in the Imperial Valley, and the only reason for that difference was Allegretti's inability to bring water to the surface for irrigation.

Allegretti sued, rather than accept a permit that would have restricted forever its ability to access the water beneath its own land – which is recognized under state law as a property right (App., p. 39).

Trial was bifurcated, with liability tried first and damages reserved for a later date if liability were found. (App., p. 4) At the conclusion of Allegretti's case, the court granted judgment for the County. (App., p. 48) The Court of Appeal affirmed (App., p. 31), and the California Supreme Court denied review (App., p. 49).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Mark Twain (perhaps apocryphally) was said to have proclaimed that ". . . whisky is for drinking, water is for fighting over." The right to use water has boiled into a multi-front national conflict in the last several years.

Recently, this Court has examined issues involving wetlands and navigable waters (*Rapanos v. United States*, 126 S.Ct. 2208 [2006]), breach of contract involving irrigation water (*Orff v. United States*, 545 U.S. 596 [2005]), and federal authority over isolated waters (*Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 [2001]).

Individuals with water beneath their land have a property right in the use of that water. Called "overlying users," they have a "legal right to use the water that is superior to all other users." (*City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1237 [2000].) However, cases dealing with the right of government agencies to interfere with that property right have begun to proliferate. Courts are reaching conflicting legal results while purporting to apply the same Fifth Amendment taking standards.

As shown in this Petition, the lower courts cannot even agree whether to analyze interference with the right to use water as a "regulatory" taking or a "physical" taking. The opinion below is a paradigm, choosing expressly to disagree with a recent decision of the U.S. Court of Federal Claims, ensuring two lines of conflicting published authority. The decision below insisted on using

regulatory taking analysis, while *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313 (Fed. Cl. 2001) held that taking the right to use water must be analyzed under physical taking standards.

If this Court agrees that substantial abrogation of the right to use water is more properly "characterized as a physical invasion" (as this Court worded the test in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]), then the prejudicial legal error in the decision below is patent. Moreover, the growing number of cases of this type demonstrates the necessity of this Court's decision of this basic analytical issue, so that the conflicting decisional law can be reconciled now.

Alternatively, however, if this Court agrees with the California courts that water right issues must always be analyzed as regulatory takings, then certiorari is still necessary in order to bring coherence to that confusing body of law. Although this Court has decided numerous regulatory taking cases since it re-entered this field in 1978 with its *Penn Central* decision, the fundamental analytical parameters remain in doubt. Key concepts, such as the meaning of "economically viable [or beneficial or productive] use" and "distinct [or reasonable] investment-backed expectations" have been the subject of decisions that shed more confusion than light. As a leading land use text put it recently:

> "[P]redictability is obviously a prerequisite of any assurance that there can be equal treatment before the law. If there are no rules specific enough to control future decisions, then every case is decided according to the *gastronomic school of jurisprudence*; that is, this is an area where

> government acts according to *gut feeling* in the individual case, *instead of by rule of law*." (1 Williams & Taylor, American Land Planning Law § 6.2 at 103 [2003 rev. ed.] [chapter entitled "'Takings' Jurisprudence: Problem of Predictability"]; emphasis added.)

This Petition thus presents the Court with the timely opportunity to address pressing national issues of water law and to provide needed guidance in the still murky field of takings law.

I

REPORTED DECISIONS ARE IN CONFLICT WHETHER DENYING PROPERTY OWNERS ACCESS TO GROUNDWATER BENEATH THEIR OWN LAND EFFECTS A PHYSICAL TAKING OF THEIR PROPERTY RIGHT TO USE THAT WATER

Currently, case law is in conflict over how to evaluate the Fifth Amendment impact of governmental abrogation of the right of access to water. Below, the California courts insisted that such interference was merely regulatory in nature and must be evaluated under the standards for regulatory takings.

In stark conflict, the *Tulare Lake* decision holds that the nature of water rights is such that interference with access to them must be analyzed as a physical taking.

Part of the problem is that lawyers (and, sometimes, judges) fall prey to the simplistic conclusion that takings are either "regulatory" or "physical". Period. However, careful reading of this Court's seminal *Penn Central*

analysis shows no such line. What the Court said there was:

> "A 'taking' may more readily be found when the interference with property *can be characterized as* a physical invasion . . . ." (*Penn Central*, 438 U.S. at 124; emphasis added.)[3]

Tulare Lake concluded that the right to extract water from the ground could not be evaluated like other property rights. Unlike typical regulations, which restore full ownership to the landowner once they are lifted (see, e.g., *Tahoe-Sierra Preservation Council v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 331-332 [2002]), the right to pump specific water out of the ground changes on a daily basis. Once today's water is gone, it is gone forever.

For that reason, the *Tulare Lake* court held that it would be overly simplistic to view a prohibition on access to water as a mere regulation, regardless of the means by which access was denied. Rather, in the spirit of *Penn Central*, that court held that the taking of water rights had to "be characterized as" a physical taking that cut off the owners permanently from access to their water. (*Tulare Lake*, 49 Fed. Cl. at 314-315, 318-320.) The deprivation was as complete as though the government had placed a fence around the property or physically trespassed on it. In fact, another decision of the Court of Federal Claims found a physical taking when the government denied property owners access to their vested water rights (which

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3 The Court plainly could have used the word "is" (rather than the phrase "can be characterized as") if that had been its intent. Most people understand what the meaning of the word "is" is.

were on land surrounded by federal land) by not providing them any way to access or divert their water to beneficial use. *Hage v. United States*, 51 Fed. Cl. 570, 572-574 [Cl. Ct. 2002].)

The issue is quite controversial. Legal commentary on *Tulare Lake* has either praised[4] or criticized[5] its physical taking analysis. The issue was widely reported in the popular press.[6] As noted earlier, when the Court of Appeal initially said that this opinion would not be

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4 E.g., Hofberger, *The Growing Conflict Between the Endangered Species Act and Federal Takings Law: Who Must Pay the Price for Protection?* 23 J. Land Resources & Envtl. L. 295 (2003); Barton, *Tulare Lake Basin Water Storage District v. United States: Why It Was Correctly Decided and What This Means For Water Rights*, 25 Environs Environmental Law & Pol'y J. 109 (2002); *Who Wants Some Water: The Ongoing Battle For the Klamath River Basin and the Need For Moderate Institutional Change to End the War*, 34 Cumb. L. Rev. 531 (2004).

5 E.g., Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 Envtl. L. 551 (2002); Doremus & Tarlock, *Fish, Farms, and the Clash of Cultures in the Klamath Basin*, 30 Ecology L.Q. 279 (2003); Curran, *Federal Government Must Pay for Water to Protect Species Under the Endangered Species Act*, 29 Ecology L.Q. 421 (2002).

6 E.g., Murphy, "In Fish vs. Farmer Cases, The Fish Loses Its Edge: California Water Viewed as Property Issue," New York Times, Feb. 22, 2005; Boxall, "U.S. to Pay $16 Million in Water Rights Case," Los Angeles Times, Dec. 22, 2004; Brazil, "Valley Farmers Win Ruling On Water: They Must Be Paid For Loss Of Irrigation," San Francisco Chronicle, May 5, 2001.

published, it received letters from across the country – from groups including the Planning and Conservation League, the National Resources Defense Council, and the Georgetown Environmental Policy Institute – urging publication precisely because of the importance of the issues and the conflict such a published opinion would create with *Tulare Lake*. They expressed their intent to cite the opinion in this case in other cases elsewhere in the country to counter the influence of *Tulare Lake*.

Even beyond *Tulare Lake*, the County has forced the impoundment of water for its own purposes *on land owned by Allegretti*. In any realistic sense of the word, the County is physically using land to which Allegretti holds fee simple title. As this Court plainly held in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), physical occupation – no matter how small – is a per se taking of property.

In the same vein, taking the right to *use* water (the same as other property) is equivalent to taking the property itself. (E.g., *International Paper Co. v. U.S.*, 282 U.S. 399, 407 [1931]; *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-754 [1950].)

Thus, whether one views this case as involving the government's physical seizure of the property right of access, or the physical use of private property to impound water to serve the public interest, or abrogation of the right to use water that disappears with each passing day, the proper mode of analysis needs to be decided by this Court. The County's permanent prohibition invokes physical taking analysis.

This case presents major issues that will not go away. They require this Court's resolution.

II

IF REGULATORY – RATHER THAN PHYSICAL – TAKING ANALYSIS APPLIES TO WATER RIGHTS, THEN THE NATIONAL CONFUSION PREVAILING IN REGULATORY TAKING CASES OVER THE BASIC ELEMENTS NECESSARY TO PROVE SUCH A TAKING MANDATES THIS COURT'S ATTENTION

This Court has made clear that there are few bright line rules in regulatory taking cases. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), the Court summarized that a per se regulatory taking occurs only when governmental action has denied property owners all economically beneficial or productive use of their land.

More recently, the Court said that it intended to create no more per se categories. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Plan. Agency*, 535 U.S. 302, 320 [2002]; *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 [2001][O'Connor, J., concurring].)

As most regulatory taking cases will be analyzed based on the multi-factor analysis in *Penn Central*, it is imperative for lower courts and litigants to understand the boundaries between the categorical takings described in *Agins* and *Lucas* and the economic analysis otherwise envisioned by *Penn Central*. As of now, however, there is no guidance worthy of the name. This Court's attention is needed now and this case presents a timely vehicle.

A

There Is Confusion In The Lower Courts About The Meaning Of "Economically Viable Use" Of Property

Regularly in the modern era of takings law this Court has repeated that, if a regulation deprives property owners of the "economically viable use" or "economically beneficial or productive use" of their property, a taking has occurred. (The first formulation appeared initially in *Agins v. City of Tiburon*, 447 U.S. 255, 260 [1981]; the latter refinement appeared in *Lucas*, 505 U.S. at 1015.)[7]

However, in *none* of those cases did the Court explain the criteria of economic viability. The phrase was simply stated and lower courts have been left to shift for themselves. Not surprisingly, those courts have developed no consistent, or even predictable, definition, leaving

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[7] In addition to *Agins* and *Lucas*, see *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Hodel v. Virginia Surface Min. etc.*, 452 U.S. 264, 296 (1981); *Kirby Forest Indus., Inc. v. U.S.*, 467 U.S. 1, 14 (1984); *Williamson County Reg. Planning Commn. v. Hamilton Bank*, 473 U.S. 172, 185 (1985); *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825, 834 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Suitum v. Tahoe Reg. Plan. Agency*, 520 U.S. 725, 734 (1997); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 719 (1999); *Tahoe-Sierra*, 535 U.S. at 313; *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005).

litigants (as well as those who would prefer to order their lives by clear rules and avoid litigation) adrift.

Commentators are in accord that chaos prevails. The following are typical, and show no change in substance between 1987 and 2006:

> "This virtually *standardless* inquiry has provided *little predictability* for property owners, nor has it served as a reliable guide for government action." (Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 The Urban Lawyer 389, 400; emphasis added [1988].)

The Ninth Circuit put it succinctly: ". . . the precise meaning of 'economically viable use' is elusive and has not been clarified by the Supreme Court." (*Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872, 877 [9th Cir. 1987].) Recent commentaries show that the situation has not changed:

> ". . . *concrete guidelines to evaluate the particular economic factors have been slim at the Supreme Court. . . . Agins* clarified the *Penn Central* three-prong balancing test to require compensation . . . if the regulation denies the owner 'economically viable use' of the property. The decision added the word 'viable' to the lexicon; *but no threshold for denial of economically viable use was defined* or relied upon . . . ." (Wade, *"Sophistical and Abstruse Formulas" Made Simple: Advances in Measurement of* Penn Central's *Economic Prongs and Estimation of Economic Damages in Federal Claims and Federal Circuit Courts*, 38 The Urban Lawyer 337, 339-340, 341; emphasis added; footnotes deleted [2006].)

> "This phrase has occurred in several instances, but to date there has been no serious attempt to define it." (1 Williams & Taylor, *supra*, § 6:14 at 125.)

The problem is more than merely parsing words; it lies in discovering what this Court intended as the base line protection afforded to property owners by the Fifth Amendment. Certainly, a deprivation of "all use" is a taking. (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 [1987].) But *Agins*' insertion of "economically viable" between "all" and "use" (and *Lucas*' refinement of that phrase to "economically beneficial or productive") had to have meant something. Otherwise, the Court could simply have said "all use" and been done with it.

The decision below is a dramatic demonstration of the need for this Court's intervention. Here, Allegretti bought a large parcel of land containing (after transfer of unusable portions to the State and Federal governments) 2,400 acres of agriculturally zoned land believed to be farmable. No more than 800 acres (and sometimes as few as 400 acres) have been farmed in any year because – although water is available in the aquifers directly beneath the farm – the County announced an extralegal policy not to allow any additional wells to be drilled unless the total amount of water withdrawn was heavily restricted – indeed, to a level less than can legally be pumped already.

Is farming 400 or 800 acres "economically viable" use of a 2,400 acre farm? The opinion below distorted the issue by saying that the owner was able to make *some* use of the property and that use was ipso facto "economically viable" use. That cannot be. There is at least an inference

in this Court's opinions that allowing *any use* does not automatically satisfy the "viable" or "beneficial" or "productive" use standard. In *Penn Central*, for example, the Court emphasized that the use allowed to the property owner allowed the owner "not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment." (*Penn Central*, 438 U.S. at 136.) That saved the regulation from being a taking. In *Williamson County*, 473 U.S. at 200, the Court noted the importance of the owner's "profit expectations." Impact on anticipated "profit" made repeated appearances in the analysis in *Keystone*, 480 U.S. at 496, 501. To get to that point, courts must get beyond the concept that "some" or "any" use automatically protects the government against any constitutional claim by property owners.

In the words of an economic commentator, "[b]y its repeated reliance on the *Penn Central* test, the U.S. Supreme Court clearly implies that regulatory takings do not require that all value be eliminated before a citizen is entitled to compensation." (Wade, *supra*, 38 The Urban Lawyer at 356.)

As of now, however, California's interpretation of this Court's regulatory taking standard is that taking a majority of the use, while leaving *some* use, is automatically "economically viable." Once and for all, this Court needs to make its meaning and its standard clear.

Does "all" mean "some"? If not, this Court evidently needs to say so. Clearly and directly.

B

There Is Confusion In The Lower Courts About The Meaning of "Investment-Backed Expectations"

Even more than "economically viable use," this Court has repeatedly said that whether regulatory conduct violates the takings clause of the Fifth Amendment can be measured by its impact on a property owner's "distinct [or reasonable] investment-backed expectations."[8]

Both courts and commentators agree that this is an important regulatory taking criterion, and may be the most important in determining whether a taking has occurred. (E.g., Eagle, Regulatory Takings § 12-1(a) at 911 [2d ed supp. 2003]; Breemer, *Playing the Expectations Game:*

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8 *Penn Central*, 438 U.S. at 124; *Andrus v. Allard*, 444 U.S. 51, 64 (1979); *Kaiser Aetna v. U.S.*, 444 U.S. 164, 175 (1979); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980); *Hodel v. Virginia Surface Min. etc.*, 452 U.S. 264, 295 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Kirby*, 467 U.S. at 14; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Williamson County*, 473 U.S. at 200; *Riverside Bayview*, 474 U.S. at 128, n. 6; *MacDonald*, 477 U.S. at 349; *Keystone*, 480 U.S. at 496, 501; *Hodel v. Irving*, 481 U.S. 704, 714 (1987); *Nordlinger v. Hahn*, 505 U.S. 1, 14, n. 4 (1992); *Lucas*, 505 U.S. at 1019, n. 8; *Babbitt v. Youpee*, 519 U.S. 234, 239 (1997); *Suitum*, 520 U.S. at 737; *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998); *Palazzolo*, 533 U.S. at 618; *Tahoe-Sierra*, 535 U.S. at 336; *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231 (2003); *Lingle*, 544 U.S. at 539.

When Are Investment-Backed Expectations (Un)reasonable in State Courts? 38 The Urban Lawyer 81, 81-82 [2006]; *Phillip Morris, Inc. v. Reilly*, 312 F.3d 24, 48-50 [1st Cir. 2002][en banc][Selya, J., concurring]; *Mayhew v. City of Sunnyvale*, 964 S.W.2d 922, 937 [Tex. 1998]; *La Salle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 797 [Ill. App. 2004].)

Notwithstanding its importance, the meaning of this phrase remains obscure, resulting in a lack of consistency in protecting this fundamental constitutional right.

> "Yet it is not clear that 'investment backed expectations' . . . has any intrinsic meaning at all." (Eagle, *supra*, § 12-1(a) at 913.)
>
> "The meaning of the phrase remains uncertain, rendering its effectiveness as a legal doctrine questionable at best." (Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 Wash. L. Rev. 91, 107 [1995].)
>
> "Although more than two decades have elapsed since *Penn Central*, neither courts nor commentators have been able to agree on the meaning or applicability of investment-backed expectations in takings law." (Radford & Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?* 9 N.Y.U. Envtl. L.J. 449, 449 [2001].)
>
> "This is then one of the trickiest and slipperiest parts of land use law." (1 Williams & Taylor, *supra*, § 6:15 at 127.)

Allegretti bought its property in 1981 for $2.5 million with the expectation that 2,400 acres could profitably be farmed. This belief was buoyed by the fact that the land had its own, on-site water supply. Allegretti put considerable money where its expectation was, preparing the land for farming.

Both the owner and the experienced farmer who cultivated all of the Allegretti land available (and would have done more if there had been irrigation water available) testified to their distinct beliefs about the ability to farm this land and Allegretti's distinct expectations to do so when the property was purchased.

Knowing that this Court's *Penn Central* decision had ordered consideration of the property owner's "distinct investment-backed expectations" as part of its analysis,[9] the California Court of Appeal said that the "unspecific lay testimony" presented by Allegretti – i.e., the testimony of the company's president and the experienced tenant farmer – provided only "abstract" evidence of expectations, not "distinct" expectations. (App., p. 21.)

There was nothing "abstract" about the expectation of farming 2,400 acres of agriculturally zoned land, and the testimony presented by the owner and his tenant was specific as to their plans. At this stage of a bifurcated trial, where the only issue was legal liability and the amount of damage done and compensation due would be tried later (see App., p. 4), nothing more was required. Certainly,

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[9] As this Court has held, the expectations concept is so significant that government interference with it – standing alone – may trigger takings liability. (*Ruckelshaus*, 467 U.S. at 1005.)

there has been no case law following *Penn Central* that amplified on the "expectations" criterion or explained what kind of showing a property owner needs to make.

With no guidance from this Court, California's courts were able to denigrate the testimony of an experienced farmer and the owner who bought the property as "unspecific lay testimony." Review by this Court is needed to expound on its critical "expectations" concept. Otherwise, confusion will continue to reign.

CONCLUSION

Serious constitutional issues have arisen at the confluence of water law and takings law. The cases in which they arise have increased in recent years and promise to continue doing so. As plainly stated by the State and National organizations that requested publication of the opinion below, there are numerous cases either pending or contemplated where the clash between this case and *Tulare Lake* will be presented. It is preferable for the Court to deal with the issue now, when it is plainly presented, rather than allow confusion to proliferate.

Respectfully submitted,

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138 Cal.App.4th 1261

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLEGRETTI & COMPANY, Plaintiff and Appellant, v. COUNTY OF IMPERIAL, Defendant and Respondent.	D045156 (Super. Ct. No. 947560)

(Filed Mar. 28, 2006)

APPEAL from a judgment of the Superior Court of Imperial County, Jeffrey B. Jones, Judge. Affirmed.

Allegretti & Company (Allegretti) appeals a judgment entered under Code of Civil Procedure section 631.8 in favor of the County of Imperial (County) on Allegretti's inverse condemnation action seeking just compensation for County's alleged taking of Allegretti's right to use groundwater underlying its property. County had approved Allegretti's application for a conditional use permit to activate a well on its property on the condition, imposed under a County ordinance, that Allegretti extract no more than 12,000 acre/feet per year of water from the aquifer underlying its property. At the close of Allegretti's liability case, the trial court ruled there was no compensable taking and entered judgment on specific findings, inter alia, that County's restriction did not deprive Allegretti of all economically viable use of its property, and Allegretti had not shown County's regulation did not advance a legitimate state interest.

On appeal, Allegretti contends County's action was without jurisdiction and constituted a physical taking of its water rights, mandating just compensation under the federal and state Constitutions. Allegretti further contends that assuming County's action amounted to a regulatory taking, compensation was mandated because (1) the regulation deprived it of all economically beneficial or productive use of its land; (2) the *Penn Central*[1] factors of economic impact, interference with investment-backed expectations, and character of the governmental action compel a finding that the regulation effected a taking; and (3) County's unauthorized action failed to substantially advance a legitimate state interest. Finally, Allegretti contends the trial court misapplied the law pertaining to temporary takings in reaching its conclusions, requiring reversal of the judgment.

We conclude County's actions, either during the course of the permitting process, in approving the permit with the use restriction, or in defending against Allegretti's inverse condemnation action, did not effect a physical or regulatory taking. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Allegretti owns property in Imperial County that overlies groundwater basins, which are accessed by Allegretti and its farmer tenant for irrigation purposes via deep-water wells and pumps. In October 1994, Allegretti filed with County an application for a conditional use permit to redrill an inoperable well, one of several existing wells on the property, so that it could add approximately

[1] *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104.

200 acres of land for crop production. Allegretti's tenant used the remaining operating wells to actively farm portions of the land between 1993 and 2004. In June 1997, County approved the conditional use permit for Allegretti's redrilling project subject to certain conditions, including one limiting Allegretti's draw of groundwater to 12,000 acre/feet per year from all production wells on site. Allegretti did not record the permit and it never took effect. Allegretti acknowledges there are no present restrictions on the use of water from its existing wells.

In November 1997, Allegretti sued County for inverse condemnation.[2] In part, it alleged County had no jurisdiction to require Allegretti to obtain a conditional use permit, and that a regulatory taking resulted from County's requirement that Allegretti obtain a permit and show reactivation of its well would not significantly or adversely affect either the environment or the groundwater basin.[3] County successfully demurred to the complaint on the ground Allegretti had failed to seek a writ of administrative mandamus and thus it did not state a cause of action since County had jurisdiction under Imperial County Ordinance sections 56350 et seq. (hereafter the ordinance) to issue a conditional use permit for the well's

[2] This was apparently Allegretti's second inverse condemnation lawsuit. It had previously filed suit against County in May 1996 concurrently with a petition for writ of mandate, but the court sustained County's demurrer without leave to amend on grounds the action was premature.

[3] Allegretti had also alleged County's delay in issuing the permit caused a taking; the parties stipulated before trial that this cause of action was no longer at issue.

reactivation.[4] In an unpublished opinion on Allegretti's appeal of that order (*Allegretti I, supra,* D031154), we reversed the judgment. We concluded that although County had general regulatory authority to control Allegretti's use of the water underlying its property (Wat.Code, §§ 104, 105; see *Baldwin v. County of Tehama* (1994) 31 Cal.App.4th 166, 173, 175-182), the record on appeal did not show County was acting on standards specific enough to permit it to limit Allegretti's groundwater use. (*Allegretti I, supra,* D031154.) The sole question resolved by our decision in *Allegretti I* was whether Allegretti was required to pursue a writ of administrative mandate before filing its action for inverse condemnation. (*Ibid.*)

Following remand, the matter proceeded to a bifurcated trial on Allegretti's inverse condemnation cause of action, with a first phase bench trial on liability to precede a second phase on the issue of just compensation. At the close of Allegretti's liability case, County moved for judgment under Code of Civil Procedure section 631.8. The court granted the motion. In its statement of decision, the court ruled, inter alia, County's application of section 56352 of the ordinance did not deprive Allegretti of all economically viable use of its property. The court found "[t]he sole evidence at trial was that a significant portion of the property is farmed by a tenant who is paying rent to [Allegretti] – there is no evidence that [Allegretti] has been denied all viable use of the property." The court further found "[Allegretti's] evidence failed to show that

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[4] We take judicial notice of our prior unpublished opinion in this case, *Allegretti & Company v. County of Imperial* (Apr. 19, 2000, D031154) [nonpub. opn.] (*Allegretti I*). (Evid.Code, §§ 452, subd. (d), 459, subd. (a).)

the conditions placed on issuance of the permit would have any economic impact at all. C[ounty] restricted total groundwater removal to 12,000 acre/feet per year as a condition to re-activating Well No. 3 – [Allegretti] offered no evidence that it had the ability to extract water in excess of 12,000 acre/feet absent the restriction." Finally, the court ruled Allegretti did not show County's regulation failed to advance a legitimate state interest.

The court entered judgment accordingly. Allegretti appeals.

DISCUSSION

I. *Standard of Review*

"The standard of review of a judgment and its underlying findings entered pursuant to [Code of Civil Procedure] section 631.8 is the same as a judgment granted after a trial in which evidence was produced by both sides. In other words, the findings supporting such a judgment 'are entitled to the same respect on appeal as are any other findings of a trial court, and are not erroneous if supported by substantial evidence.'" (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.4th 517, 528.) "When the decisive facts are undisputed, however, the reviewing court is confronted with a question of law and is not bound by the findings of the trial court. [Citation.] In other words, the appellate court is not bound by a trial court's interpretation of the law based on undisputed facts, but rather is free to draw its own conclusion of law." (*Ibid.*)

Whether there was a compensatory taking is a question of law, and we are not bound by the lower court's interpretation of the evidence presented on the question

below. (*Yee v. Mobilehome Park Rental Review Bd.* (1998) 62 Cal.App.4th 1409, 1418; see also *Bass Enter. Prod. C. v. United States* (1998) 133 F.3d 893, 895 ["Whether a taking is compensable under the Fifth Amendment is a question of law based on factual underpinnings"].)

II. *General Principles of Takings Law*

The state and federal Constitutions guarantee real property owners "just compensation" when their land is "taken . . . for public use. . . ." (13 Cal. Const., art. I, § 19; U.S. Const., 5th Amend.; *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, ___ [125 S.Ct. 2074, 2081] (*Lingle*); *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 12-13.) The Fifth Amendment's Takings Clause, made applicable to the states through the Fourteenth Amendment, does not prohibit the taking of private property, but instead places a condition on the exercise of that power. (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p.2080].) "In other words, it 'is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.'" (*Ibid.*)

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2081].) But "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster – and . . . such 'regulatory takings' may be compensable under the Fifth Amendment." (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2081].) Supreme Court precedents recognize two categories of regulatory action that generally will be

deemed *per se* takings for Fifth Amendment purposes. (*Ibid.*) First, where government requires an owner to suffer a "permanent physical invasion" of his property – even as minor as cable lines and boxes bolted onto an apartment building's roof and exterior walls – it must provide just compensation. (*Id.* at p. ___ [125 S.Ct. at p. 2081], citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 (*Loretto*); see also *Yee v. City of Escondido* (1992) 503 U.S. 519, 527 ["The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land"].) "A second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial use' of her property." (*Lingle, supra,* at p. ___ [125 S.Ct. at p. 2081], quoting *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019 (*Lucas*).) "[I]n *Lucas* [the high court held] that the government must pay just compensation for such 'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property." (*Lingle,* 544 U.S. at p. ___ [125 S.Ct. at p. 2081].)

Outside these two categories, regulatory takings challenges are governed by the "essentially ad hoc, factual inquiries" set forth in *Penn Central, supra,* 438 U.S. 104. (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2081]; *Penn Central,* at p. 124; *Herzberg, supra,* 133 Cal.App.4th at p. 14.) There is no set formula, but "'several factors . . . have particular significance.' [Citation.] Primary among those factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' [Citation.] In addition, the 'character of the

governmental action' – for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good' – may be relevant in discerning whether a taking has occurred. [Citation.] The *Penn Central* factors – though each has given rise to vexing subsidiary questions – have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules." (*Lingle,* 544 U.S. at p. ___ [125 S.Ct. at pp. 2081-2082]; see *Herzberg,* at p. 14.)

Each of these *Penn Central* inquiries aims to "identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights." (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2082]; *Herzberg, supra,* 133 Cal.App.4th at p. 14.)

III. *County's Permit Condition Does Not Constitute a Physical Taking*

We first address Allegretti's contention that County's action effected a physical taking of Allegretti's "water rights"[5] mandating compensation as a per se taking.

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[5] Allegretti's right to extract groundwater is as an "overlying" owner. As the California Supreme Court has explained, "overlying water rights are usufructuary only, and while conferring the legal right to use the water that is superior to all other users, confer no right of private ownership in public waters." (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1237; *Central and West Basin Water*

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Relying on air rights cases, cases involving the government's diversion of water from landowners, and the decision of the Federal Circuit Court of Claims in *Tulare Lake Basin Water Storage Dist. v. United States* (2001) 49 Fed.Cl. 313 (*Tulare Lake*), Allegretti maintains County's regulation, which it characterizes as denying it access to the aquifer on its land, physically took Allegretti's right to use the water as if it had diverted it elsewhere. Allegretti argues "when one is precluded from exercising the right to use water today, the right to use that particular water is gone forever."

In response, County points out its sole actions were (1) refusal to issue a well drilling permit in the absence of full compliance with the California Environmental Quality Act (CEQA) and (2) issuance of an alternative permit with conditions that would have placed a limit on Allegretti's groundwater extractions. It, as well as amicus Attorney General, argues those actions did not physically invade, impound or appropriate Allegretti's property and convert it to some other use, and thus it is not a categorical physical taking under United States Supreme Court precedents. Both County and the Attorney General challenge Allegretti's reliance on *Tulare Lake* as misplaced; they maintain *Tulare Lake* conflates physical and regulatory takings analyses and was wrongly decided.

The United States Supreme Court in *Loretto, supra,* carefully distinguished permanent physical takings from both temporary physical invasions and regulations merely

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Replenishment Dist. v. Southern Cal. Water Co. (2003) 109 Cal.App.4th 891, 905 ["there is no private ownership of groundwater"].) Water rights carry no specific property right in the corpus of the water itself. (*Big Rock M.W. Co. v. Valyermo Ranch Co.* (1926) 78 Cal.App. 266, 275.)

restricting the use of private property. (*Loretto, supra,* 458 U.S. at pp. 427-435.) It pointed out that a compensable physical taking would occur in circumstances where "real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it" (*id.* at p. 427); flooding results in an "'actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property'" (*id.* at p. 428); telegraph or telephone lines, rails and underground pipes or wires are placed above or below an owner's property (*id.* at pp. 428-429); or where the government causes frequent aircraft flights immediately above an owner's property, as such action is analogous to construction of an elevated railway causing an "'intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it.'" (*Id.* at p. 431, citing *U.S. v. Causby* (1946) 328 U.S. 256, 264-265.) Such circumstances are not the same as where, for example, the government orders nonessential gold mines to cease operations for the purpose of conserving equipment or manpower (*Loretto,* at p. 431, citing *United States v. Central Eureka Mining Co.* (1958) 357 U.S. 155, 165-166 [government "did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them"].)

More recently, in *Brown v. Legal Foundation of Wash.* (2003) 538 U.S. 216 the court explained: "'When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [citation], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is

mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. [Citations.] Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants [citation]; or when its planes use private airspace to approach a government airport [citation], it is required to pay for that share no matter how small.'" (*Brown v. Legal Foundation of Wash., supra,* 538 U.S. at p. 235, quoting *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 321-323.) California authority abides by these distinctions. (See *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 888-889; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9-10; *NJD, Ltd. v. City of San Dimas* (2003) 110 Cal.App.4th 1428, 1435 [categorical taking requires that the government physically take possession of an interest in property for a public purpose]; *Loewenstein v. City of Lafayette* (2002) 103 Cal.App.4th 718, 728.)

In the context of water rights, our highest court has found a physical taking where the government diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights. (*Washoe County v. United States* (2003) 319 F.3d 1320, 1326, citing *Dugan v. Rank* (1963) 372 U.S. 609, 614, 625-626 [government's upstream impounding of water at a dam constitutes a taking of water rights from downstream owners, analogizing government action to taking of airspace over land]; *Int'l Paper County. v. United States* (1931) 282 U.S. 399, 407-408 [taking found where the Secretary of War ordered a private power company to withdraw water from the petitioner's mill to increase power production for government uses].)

County's action with respect to Allegretti in the present case – imposition of a permit condition limiting the total quantity of groundwater available for Allegretti's use – cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. The County did not physically encroach on Allegretti's property or aquifer and did not require or authorize any encroachment (e.g. *Yee v. City of Escondido, supra,* 503 U.S. 519, 527); it did not appropriate, impound or divert any water. The County's permit decision does not effect a per se physical taking under any reasonable analysis.

We are not persuaded by Allegretti's reliance on the U.S. Court of Federal Claims's decision in *Tulare Lake, supra,* 49 Fed.Cl. 313, as support for the proposition that use restrictions on underground water rights are analogous to a categorical physical taking. In *Tulare Lake,* water districts argued that their water rights, which were contractually conferred by certain governmental agencies, were taken in violation of the Fifth Amendment by use restrictions imposed by the State Water Resources Control Board (the Board) under the Endangered Species Act. (*Id.* at pp. 314-316.) Comparing the circumstances to the overflights of aircraft found to constitute a taking in *United States v. Causby, supra,* 328 U.S. 256, the *Tulare Lake* court held the restrictions caused a physical taking of the plaintiffs' contractual entitlement to a particular amount of water from the Board's facilities.[6]

[6] The *Tulare Lake* court stated: "In the context of water rights, a mere restriction on use – the hallmark of a regulatory action – completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water. [Citation.] Unlike other species of property where

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Allegretti has provided no authority compelling us to follow the holding of an intermediate federal court. To the contrary, we are not bound by lower federal court decisions. (*People v. Gray* (2005) 37 Cal.4th 168, 226.) Even if we found it appropriate to consider *Tulare Lake,* we would find it distinguishable by virtue of the existence of identifiable contractual rights between the plaintiffs and water rights holder, rights that are not present in this case.

In any event, the persuasive value of *Tulare Lake* has been undercut in *Klamath Irrigation District v. United States* (2005) 67 Fed.Cl. 504 (*Klamath*), in which the court rejected the underpinnings of its *Tulare Lake* decision. (*Id.* at p. 538 ["with all due respect, *Tulare* appears to be wrong on some counts, incomplete on others, and distinguishable, in all events"].) In *Klamath,* the court criticized *Tulare Lake's* treatment of the plaintiffs' contracts as absolute and "confer[ring] on plaintiffs a right to the exclusive use of prescribed quantities of water," without adequately considering whether the contracts were limited in the event of water shortage by prior contracts, prior appropriations or other state law principles. (*Klamath,* 67

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use restrictions may limit some, but not all of the incidents of ownership, the denial of a right to the use of water accomplishes a complete extinction of all value. Thus, by limiting plaintiffs' ability to use an amount of water to which they would otherwise be entitled, the government has essentially substituted itself as the beneficiary of the contract rights with regard to that water and totally displaced the contract holder. That complete occupation of property – an exclusive possession of plaintiffs' water-use rights for preservation of the fish – mirrors the invasion present in *Causby*[, *supra,* 328 U.S. 256]. To the extent, then, that the federal government, by preventing plaintiffs from using the water to which they would otherwise have been entitled, have rendered the usufructuary right to that water valueless, they have thus effected a physical taking." (*Tulare Lake, supra,* 49 Fed. Cl. at p. 319.)

Fed.Cl. at p. 538.) The court further faulted *Tulare Lake* for neglecting to consider whether the plaintiffs' claimed use of water violated state doctrines including those designed to protect fish and wildlife, noting as a consequence *Tulare Lake* awarded just compensation "for the taking of interests that may well not exist under state law." (*Klamath,* 67 Fed.Cl. at p. 538.) Finally, the court noted the *Tulare Lake* decision did not consider numerous decisions vitiating takings claims by the availability of contract remedies. (*Ibid.,* citing *Hughes Communications Galaxy, Inc. v. United States* (Fed.Cir. 2001) 271 F.3d 1060, 1070 ["'the concept of taking as a compensable claim theory has limited application to the relative rights of party litigants when those rights have been voluntarily created by contract. In such instances, interference with such contractual rights generally gives rise to a breach claim not a taking claim'"]; *United States v. Winstar Corp.* (1996) 518 U.S. 839, 919; *Glendale Fed. Bank, FSB v. United States* (2001) 239 F.3d 1374, 1379-1380; *Castle v. United States* (Fed.Cir. 2002) 301 F.3d 1328, 1342.) For these reasons, *Klamath* rejected *Tulare Lake's* approach and supporting rationales.

We likewise decline to rely on *Tulare Lake's* reasoning to find a physical taking under the circumstances presented by County's action. Aside from the deficiencies noted in *Klamath, supra,* 67 Fed.Cl. at p. 504, we disagree with *Tulare Lake's* conclusion that the government's imposition of pumping restrictions is no different than an actual physical diversion of water. (*Tulare Lake, supra,* 49 Fed.Cl. at pp. 319-320.) The reasoning is flawed because in that case the government's passive restriction, which required the water users to leave water in the stream, did not constitute a physical invasion or appropriation like the

government's diversion in *International Paper Co. v. United States, supra,* 282 U.S. 399 or its low flight of army and navy airplanes in *Causby, supra,* 328 U.S. at page 259. *Tulare Lake's* reasoning disregards the hallmarks of a categorical physical taking, namely actual physical occupation or physical invasion of a property interest.[7]

IV. *County's Action is Not a Regulatory Taking*

Allegretti contends that if we conclude County's permit decision must be analyzed as regulatory action, we should nevertheless hold it constitutes a categorical taking because it denied Allegretti all economically beneficial or productive use of its land by "preventing the full utilization of water that Allegretti had a right to access." Alternatively, Allegretti contends County's action constitutes a taking under *Penn Central's* factual analysis.

County's act in conditioning Allegretti's permit on certain water use limitations is of a regulatory nature, and as we previously held in *Allegretti I,* it is an act taken under the authority of its police powers. A government regulation that restricts certain private uses of a portion of an owner's property does not constitute a categorical taking; it is to be analyzed under regulatory takings jurisprudence. (See *Brown v. Legal Foundation of Wash., supra,* 538 U.S. at p. 235; *Tahoe-Sierra Preservation*

[7] We deny County's request for judicial notice of letters from California's Chief Deputy Attorney General for Legal Affairs and the Chair of the California State Water Resources Control Board. County does not provide explanation why these letters written by governmental employees constitute "official acts" in contrast to mere correspondence. Moreover, given our reliance on *Klamath,* it is not necessary to our decision to take judicial notice of these items.

Council, Inc. v. Tahoe Regional Planning Agency, supra, 535 U.S. at pp. 321-323; *Hensler v. City of Glendale, supra,* 8 Cal.4th at pp. 9-10.)

A. *Total Regulatory Taking*

When government regulation completely deprives an owner of "'*all* economically beneficial us[e]'" of its land, a taking is established and just compensation is due. (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2081]; *Lucas, supra,* 505 U.S. at p. 1015; see also *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617; *NJD, Ltd. v. City of San Dimas, supra,* 110 Cal.App. 4th at pp. 1436-1438; *Loewenstein v. City of Lafayette, supra,* 103 Cal.App.4th at p. 728.)

Allegretti maintains it presented evidence that "demonstrated a deprivation of 'economically beneficial or productive use'" by showing: (1) productive use of Allegretti's 2400 acre farm had been "restricted by lack of the ability to pump sufficient water from underground to irrigate and cultivate more than 800 acres, sometimes less"; (2) the owner had a reasonable belief and expectation he could farm the full 2400 acres and make a substantial profit on his investment; and (3) the owner and his tenant farmer would be able to farm more land if they could gain access to additional water for irrigation. Allegretti argues: "Being able to farm 400 or 600 or 800 acres out of a 2400 acre farm may be some 'use,' but it is not 'economically beneficial or productive' use of a multi-million dollar investment that was made nearly a quarter-century ago in anticipation of farming the entire ownership."

Allegretti concedes an ability to irrigate and farm four to eight hundred acres of its property even if County's permit condition were in effect and therefore this has not been a total regulatory taking. Allegretti misstates the requisite economic deprivation to constitute a categorical regulatory taking: we do not assess whether a regulation deprives some or even a vast majority of economic use; as *Lingle* most recently emphasized it must deprive an owner of *all* economically beneficial use of the land. (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2081].) The trial court ruled County's permit condition did not result in such a deprivation on a finding that a significant portion of the property is farmed by a tenant who was paying Allegretti rent. Allegretti does not challenge the evidence to support this factual finding and indeed, Michael Morgan, Allegretti's tenant, who leased 1686 acres of Allegretti's property at $75 per acre, testified he had "upwards of 800 acres" in production at the time of trial.[8]

B. *Penn Central Analysis*

When a regulation does not result in a physical invasion and does not deprive the property owner of all economic use of the property, a reviewing court must evaluate the regulation in light of the *Penn Central* factors. (*Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, 775 (*Kavanau*).) "*Penn Central* emphasized

[8] 800 acres was one half the cultivatable portion of the property. Joseph Allegretti, who purchased the property in 1981, testified that out of the 2400 acres presently encompassing Allegretti's farm, the most its tenant had ever farmed was 900 acres in 1988; at the time of trial only 1,800 acres were cleared for farming, and 1600 acres were cultivatable.

three factors in particular: (1) '[t]he economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" (*Kavanau,* 16 Cal.4th at p. 775; accord, *Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at pp. 2081-2082]; *Palazzolo v. Rhode Island, supra,* 533 U.S. at p. 633.)

These above-enumerated factors are the sole criteria on which Allegretti relies in asserting its taking claim. We may dispose of a takings claim on the basis of one or two of these factors. (*Bronco Wine v. Jolly* (2005) 129 Cal.App.4th 988, 1035, citing *Maritrans Inc. v. United States* (Fed.Cir. 2003) 342 F.3d 1344, 1359 [where the nature of the governmental action and the economic impact of the regulation did not establish a taking, the court need not consider investment-backed expectations] & *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005 [disposing of takings claim relating to trade secrets solely on absence of reasonable investment-backed expectations] & *Andrus v. Allard* (1979) 444 U.S. 51, 65-68.)

Applying the three *Penn Central* factors relied upon by Allegretti does not persuade us to find County's action constitutes a regulatory taking. Importantly, the basis for this factual inquiry "is the owner's entire property holdings at the time of the alleged taking, not just the adversely affected portion." (*Buckley v. California Coastal Com.* (1998) 68 Cal.App.4th 178, 193, citing *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 497.) Thus the relevant parcel is Allegretti's 2400 acres, and not merely its right to draw water from it. (E.g., *Florida Rock Indus. Inc. v. United States* (Fed. Cl. 1999) 45 Fed.Cl. 21, 33.)

Beginning with the last mentioned *Penn Central* factor, the character of the governmental action, County's action did not physically invade or appropriate Allegretti's property or groundwater. Accordingly, that factor does not support a taking. (See *Connolly v. Pension Ben. Guar. Corp.* (1986) 475 U.S. 211, 225; *Golden Cheese Co. v. Voss* (1991) 230 Cal.App.3d 727, 738-739.)

As for the economic impact of County's regulation, Allegretti concedes it did not establish the precise amount of such an impact through expert testimony at trial, but maintains such testimony is unnecessary because it is plain that County's action has restricted Allegretti's ability to draw water to the capacity of its existing wells, thus limiting its farm production to between 400 and 800 acres of a 2,400 parcel. Allegretti criticizes the trial court's reliance on the fact Allegretti was receiving rental income on a portion of the property, claiming the preservation of "some economically beneficial use" is not sufficient to constitute a defense in the County's favor.

In addressing economic impact, we ask whether the regulation "unreasonably impair[s] the value or use of [the] property" in view of the owners' general use of their property. (E.g., *PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, 83.) Not only is the use to which the property owner puts his or her property important, but the economic impact needs to be considered in the context of other laws and regulatory schemes. (*See Connolly v. Pension Benefit Guar. Corp., supra,* 475 U.S. 211, 225-226 [evaluating economic impact of imposing withdrawal fees on employers who leave pension funds within context of entire ERISA scheme].) We note the U.S. Supreme Court has repeatedly upheld land use regulations that destroy or adversely affect real property interests. (*Keystone*

Bituminous Coal Assn. v. DeBenedictis, supra, 480 U.S. at p. 489, fn. 18.)

Allegretti has not demonstrated any economic impact from County's 12,000 acre/feet per year limitation other than unspecific lay testimony regarding reduced profits via a below market rental rate or diminution in value as a result of its inability to use the entirety of its 2400-acre property for farming. It is well established that mere diminution in value of property, however serious, does not constitute a taking. (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern Cal.* (1993) 508 U.S. 602, 645, citing *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [approximately 75% diminution in value]; *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 405 [92.5% diminution]; see also *Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal.App.3d 1016, 1036; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 ["[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"].) Under *Penn Central,* regulations that prohibit the "most beneficial use of the property" or which prohibit "a beneficial use to which individual parcels had previously been devoted and thus cause[] substantial individualized harm" are not takings. (*Penn Central, supra,* 438 U.S. at p. 125.) Like most land use regulations, the ordinance may have "'"the inevitable effect of reducing the value of regulated properties,"'" but even a "'"significant diminution in value is insufficient to establish a confiscatory taking."'" (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 912, quoting *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 267.)

Allegretti has not demonstrated compensable interference with "distinct investment backed expectations" (*Penn Central, supra,* 438 U.S. at p. 124; *Kavanau, supra,* 16 Cal.4th at p. 781) by County's 12,000 acre/feet per year limitation. The sole evidence on which it relies is Joe Allegretti's testimony that he purchased the land for $2.5 million and made improvements with the expectation he could farm all 2,400 acres and make a substantial profit off the investment. It also points to Joe Allegretti's testimony that he could farm more acres if he had more operable wells, and testimony from Allegretti's tenant that he intended to farm all 1686 acres, but could not because there was not enough water. Citing *City of Barstow v. Mojave Water Agency, supra,* 23 Cal.4th at p. 1224, Allegretti asserts it "has the right to put to use as much of that water as it needs in order to irrigate its cropland."

There are several flaws in this argument. First, the evidence does not reveal distinct, as opposed to abstract, expectations. Joe Allegretti's testimony was only that he had purchased the farm having been given "lots of reassurances that it *could be* a viable farming operation" (emphasis added) and that his investment had not yet reached expectation.[9] A "'reasonable investment-backed expectation'" must be more than a "'unilateral expectation or an abstract need.'" (*Ruckelshaus v. Monsanto Co., supra,* 467 U.S. at pp. 1005-1006.) Further, as our high

[9] Joe Allegretti further testified: "When we originally purchased the property we thought that we could farm at least as much land as the previous owner had farmed. We didn't give a lot of thought to farming on the north side of the highway. But we thought that everything we owned on the south side of the highway was doable." The evidence of Allegretti's expectation is too general to meet the requisite *Penn Central* factor.

court in *City of Barstow* acknowledged, although an overlying user such as Allegretti may have superior rights to others lacking legal priority, Allegretti's water "right" is nonetheless restricted to a reasonable beneficial use consistent with article X, section 2 of the California Constitution. (*City of Barstow v. Mojave Water Agency, supra,* 23 Cal.4th at p. 1240.) Allegretti's claim to an unlimited right to use as much water as it needs to irrigate flies in the face of that standard, and it has not pointed to any evidence in the record that its proposed irrigation of all 2400 acres would be reasonable within the meaning of the constitutional restriction. Second, Allegretti's claim is essentially that it has lost "at least the potential for substantial profits." Allegretti's claim of loss of anticipated profits or gain is not compensable, as it "demonstrate[s] no more than a possible restriction upon more economic uses of its property." (*Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal.App.3d 892, 912.) Because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. (*Andrus v. Allard, supra,* 444 U.S. at p. 66.) For the foregoing reasons, Allegretti's claim of a regulatory taking under *Penn Central* is not persuasive.

C. *Whether County's Action Substantially Advances a State Interest Is No Longer A Valid Standard to Assess An Unconstitutional Taking Under the Fifth Amendment*

Applying the standard of *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260 (*Agins*), that a regulatory taking be found when an ordinance "does not substantially advance legitimate state interests," Allegretti maintains

County's permit condition effects a taking because an act taken without jurisdiction and arbitrary as a matter of law is incapable of furthering or advancing any legitimate governmental objective.

In *Lingle,* the court reconsidered the validity of *Agins's* "substantially advance[s] state interests" standard as a "stand-alone regulatory takings test" and disavowed it, concluding it "prescribes an inquiry in the nature of a due process, not a takings test, and that it has no proper place in our takings jurisprudence." (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2083].) The "substantially advances" inquiry, the Court explained, "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause." (*Id.* at p. ___ [125 S.Ct. p. 2084].)

Further, the "'substantially advances' inquiry is prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. . . . Conversely, if a government action is found to be impermissible – for instance because it fails to meet the 'public use' requirement or is so arbitrary as to violate due process – that is the end of the inquiry. No amount of compensation can authorize such action." (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2085].) Finally, application of

the *Agins* formula is practically difficult to apply, requiring courts to scrutinize the efficacy of a vast array of state and federal regulations, and empowers courts to improperly substitute their judgments for that of the legislature or expert administrative agencies. (*Lingle, supra,* 544 U.S. at p. ___ [125 S.Ct. at p. 2085].)

In its reply brief, Allegretti maintains while the *Agins* formula is no longer viable under the Fifth Amendment, it remains part of California takings law, in part based on the use of that standard by the California Supreme Court in *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006 (*Landgate*). Even if that were the case, the test does not assist it. As we explain below, applying *Landgate's* test, County's action does not constitute a taking.

V. *Application of Landgate*

The Attorney General, as amicus curiae for County, contends we need not reach the question whether County's action constitutes a taking under *Penn Central* because any regulatory taking claim by Allegretti is one involving a temporary taking that is procedurally barred by the California Supreme Court's decision in *Landgate, supra,* 17 Cal.4th 1006. County reiterated that position at oral argument before us. While Allegretti criticized the trial court's analysis of *Landgate* in its appellate briefs, it urged us to apply *Landgate* at oral argument on this matter, arguing it supports its assertion of an unconstitutional taking under *Agins, supra,* 447 U.S. 255 as a matter of California law. Although it is not clear whether Allegretti proceeds on the theory of a permanent or temporary taking, we nonetheless address *Landgate* because Allegretti seeks

to apply *Agins'* substantially-advances-state interests test on the ground *Landgate* retains its viability. We conclude that Allegretti's takings claim cannot succeed even under *Landgate's* standards.[10]

Landgate assessed whether an erroneous land use decision – in that case, a permit denial by the California Coastal Commission – could be the foundation for the owner to recover damages for a temporary taking,[11] or whether it was a noncompensable "'normal delay'" in development. (*Id.* at pp. 1010, 1018.) In that case, the landowner had obtained a court judgment that the Coastal Commission had no permit jurisdiction over a lot line adjustment, and contended the delay in development denied it all viable use of its property for two years. (*Id.* at pp. 1014-1015.)

The Court of Appeal, after concluding the permit denial was erroneous, held there was a temporary taking because the agency had an improper motive for denying the permit. (*Landgate, supra,* 17 Cal.4th at pp. 1015-1016.) The California Supreme Court reversed, holding a

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[10] Given our conclusion, we need not address the duration of any such temporary taking or its beginning and endpoints, i.e., whether it was triggered by the County's grant of the conditional permit or by our decision in *Allegretti I*, and whether it endures until the trial court's order for judgment is final on appeal.

[11] In *First English Evangelical Lutheran Church of Glendale v. Los Angeles County* (1987) 482 U.S. 304, the United States Supreme Court identified two reasons why a regulation temporarily denying an owner all use of her property might not constitute a taking, one involving questions that "arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like," issues that were not before the court in that case. (*Id.* at p. 321; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, supra,* 535 U.S. at pp. 328-329.)

delay in the regulatory process as the result of a mistaken assertion of jurisdiction could not constitute a taking: "[G]overnment land use regulations and decisions ... which, despite their ultimately determined statutory defect, are part of a reasonable regulatory process designed to advance legitimate government interests, are not takings of property...." (*Id.* at p. 1021, citing *Agins, supra,* 447 U.S. at p. 260.) The court analogized the situation to that in *Agins,* where the government's abandonment of condemnation proceedings, causing a substantial delay in the development approval process and leading to losses in the property's value, did not constitute a taking. (*Landgate, supra,* 17 Cal.4th at p. 1021.)

In *Landgate,* the court pointed out the landowner had "not demonstrated that the development delay ... was due to anything other than a bona fide dispute over the legality of [the landowner's] lot and the [Coastal] Commission's jurisdictional authority over the lot line adjustment. Such delay is an incident of property ownership and not a taking of property. [Citation.] Although [the landowner] was in the unfortunate position of suffering from a delay not of its own making, the same can be said of any governmental mistake or, for that matter, any number of possible bottlenecks in the development process." (*Landgate, supra,* 17 Cal.4th at pp. 1031-1032.)

Under *Landgate,* no taking occurs if objectively there is "sufficient connection between the land use regulation in question and a legitimate governmental purpose, so that the former may be said to substantially advance the latter." (*Landgate, supra,* 17 Cal.4th at p. 1022, citing *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 836-837 & *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391.) The court distinguished situations where government

action is "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective." (*Landgate,* at p. 1024.)

The Attorney General compares this situation to *Landgate,* characterizing our prior decision in *Allegretti I* as holding County did not have jurisdiction to impose water use restrictions due to inadequate standards in the ordinance. Assuming the correctness of the Attorney General's characterization of our decision, we agree *Landgate* is dispositive of any taking alleged by Allegretti to have occurred during the permit process and resulting litigation. The permit condition, imposed under County's police power for the purpose of conserving groundwaters and preventing their undue waste, had an objectively sufficiently connection to that valid governmental interest. (See *In re Maas* (1933) 219 Cal. 422, 424-425 [general police powers of counties permit them to adopt ordinances for the conservation of groundwater when such ordinances do not conflict with any general law of the State]; *Baldwin v. County of Tehama, supra,* 31 Cal.App.4th at pp. 173-174.) Allegretti does not identify and thus does not meaningfully challenge County's underlying *reasons* for its action, nor does it explain why County's limitation is in any way arbitrary; it merely asserts County' action "*could not* substantially advance *any* interest" because it was without jurisdiction. But as stated, *Landgate* merely requires that we objectively assess whether there exists a "sufficient connection between the land use regulation in question and a legitimate governmental purpose." (*Landgate, supra,* 17 Cal.4th at p. 1022.) We find such a connection here.

Citing Wisconsin authority that does not bind us (*Eberle v. Dane County Bd. of Adjustment* (Wis. 1999) 595 N.W.2d 730), Allegretti criticizes *Landgate* for reasoning that litigation can be part of the normal regulatory process. It also seeks to distinguish *Landgate,* pointing out the delay in that case was only two years, whereas the delay here was more than 10 years. We find neither of Allegretti's points persuasive. As for the first, we are bound by *Landgate's* analysis. (*Landgate, supra,* 17 Cal.4th at p. 1019 [approving authority involving delay caused by process of presenting a judicial challenge to regulation].) As to the latter, as County points out, such lengthy delays can be part of the normal regulatory process. (E.g. *Calprop Corp. v. City of San Diego* (2000) 77 Cal.App.4th 582, 600-601.)

Allegretti's main argument as to *Landgate's* application is that County's acts were "so unreasonable from a legal standpoint" that they had no true, legitimate purpose. Allegretti also suggests the litigation between it and County does not constitute a "bona fide dispute." (*Landgate, supra,* 17 Cal.4th at p. 1031.) Comparing the circumstances to those in *Ali v. City of Los Angeles* (1999) 77 Cal.App.4th 246 (*Ali*), it argues "County's insistence initially in asserting jurisdiction, and then in continuing to assert jurisdiction after this Court explained its total absence, and then failing to take any measures to augment its ordinance after this Court explained its utter inadequacy . . . demonstrates that the County cannot bring itself within the shelter of *Landgate.*"

This case is not comparable to *Ali,* in which the City's action in denying a demolition permit under a single room occupancy (SRO) ordinance, temporarily depriving the property owner of *all* economically viable use of his land,

was held to be prohibited by the Ellis Act (Govt. Code, § 7060, subd. (a)). (*Ali, supra,* 77 Cal.App.4th at pp. 248, 252-253, 255.)[12] The appellate court concluded that the City's continued invocation of the SRO ordinance was not a normal delay in the development process within the meaning of *Landgate,* observing that because the illegality of the City's action was apparent from case authority existing *before* the City initially withheld the permit, its position was "'so unreasonable from a legal standpoint' . . . as to be arbitrary, not in furtherance of any legitimate governmental objective, and for no other purpose than to delay any development other than for an SRO hotel." (*Ali,* at p. 255.) Here, County's initial action in imposing the permit condition under its police power was not objectively unreasonable, particularly where the trial court had initially accepted its argument, and its arguments before us in *Allegretti I* were plausible. (See *Landgate, supra,* 17 Cal.4th at p. 1020, citing *Littoral Development Co. v. San Francisco Bay Conservation Etc. Com.* (1995) 33 Cal.App.4th 211, 221 [government's actions "were facially valid and supported by a plausible though erroneous legal argument [that] the trial court accepted"].) Nor can we say County's continued defense against Allegretti's inverse condemnation action following our decision in *Allegretti I* was objectively unreasonable. Our conclusion in *Allegretti I* was on its face based solely on the standards set out in Imperial County Ordinance sections 56350 et seq.; our opinion expressly acknowledged the possible existence outside the record of further standards by which County

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[12] One court has noted criticism of *Ali's* reasoning. (*Loewenstein v. City of Lafayette, supra,* 103 Cal.App.4th at p. 735, citing Alperin, *The "Takings" Clause: When Does Regulation "Go Too Far?"* (2002) 31 Sw.U.L.Rev. 169, 221-225.)

could regulate Allegretti's groundwater use. That County ultimately did not present additional standards at trial on Allegretti's inverse condemnation action did not render its defense of that action objectively unreasonable. This is particularly true where, in its inverse condemnation action, Allegretti did not seek to merely litigate the validity of County's restriction (indeed, by the time of trial Allegretti had already rejected County's permit); it sought *damages* for County's purported physical taking of its groundwater. County had every right to maintain a defense based on its perceived lack of a constitutionally compensable taking.

Assuming the circumstances of this case warrant application of *Landgate,* our conclusion ends the analysis: "Once a court determines that a governmental entity engaged in decision-making whose purpose is not delay for delay's sake but legitimate oversight, the question of whether a landowner has a reasonable investment-backed expectation that is impacted in a manner requiring compensation is, of necessity, answered in the negative. A landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement. Because such delay comes within the *Landgate* category of normal delays in the development approval process, there is no taking even if the value of the subject property is diminished in some way." (*Loewenstein v. City of Lafayette, supra,* 103 Cal.App.4th at pp. 736-737.)

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/ O'Rourke
O'ROURKE, J.

WE CONCUR:

/s/ Huffman
HUFFMAN, Acting P. J.

/s/ McDonald
McDONALD, J.

CERTIFIED FOR PUBLICATION

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLEGRETTI & COMPANY, Plaintiff and Appellant, v. COUNTY OF IMPERIAL, Defendant and Respondent.	D045156 (Super. Ct. No. 94756) ORDER CERTIFYING OPINION FOR PUBLICATION

(Filed Apr. 26, 2006)

THE COURT:

The opinion filed March 28, 2006, is ordered certified for publication.

The attorneys of record are:

Manatt, Phelps & Phillips, Michael M. Berger; and Jeffrey L. Marcus for Plaintiff and Appellant.

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Bill Lockyer, Attorney General, Thomas Greene, Assistant Attorney General, J. Matthew Rodriquez, Joseph

Barbieri and Tara L. Mueller, Deputy Attorneys General as Amicus Curiae on behalf of Defendant and Respondent.

/s/ Huffman
HUFFMAN, Acting P. J.

Copies to: All parties

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ALLEGRETTI & COMPANY, Plaintiff and Appellant, v. COUNTY OF IMPERIAL, Defendant and Respondent.	D031154 (Super. Ct. No. 94756)

(Filed Apr. 19, 2000)

APPEAL from a judgment of the Superior Court of Imperial County, Milton Milkes, Judge. Reversed.

Plaintiff and appellant Allegretti & Company (Allegretti) argues defendant and respondent County of Imperial (County) exceeded its jurisdiction when it conditioned the granting of a permit to reactivate a ground water well on limitations as to the amount of water Allegretti could take yearly from both the reactivated and currently operating wells on its property. County replies that not only does it have such jurisdiction but that Allegretti is foreclosed from raising the issue since it failed to exhaust its administrative remedies.

BACKGROUND

Allegretti appeals from the grant of County's demurrer without leave to amend to its complaint seeking compensation for inverse condemnation.

1. Complaint

Allegretti's complaint alleged it owned farmland in Imperial County overlying a ground water basin. For many years six wells located on the property were used to extract ground water. In 1979 one of the wells was deactivated. In October 1994, Allegretti sought a conditional use permit pursuant to the Codified Ordinances of the County of Imperial, chapter 3.5,[1] section 56350 et seq., to reactivate the sixth well.

County sought detailed information from Allegretti concerning, among other matters, the number of wells in operation on the property, the maximum annual amount of water taken by the active wells and the amount of water to be taken by the reactivated well. County also sought evidence that granting Allegretti's permit would not adversely affect the underlying ground water basin.

In June 1995 Allegretti's application was considered by the County Environmental Evaluation Committee (EEC) to determine whether compliance with the California Environmental Quality Act (CEQA) was required. The EEC concluded the reactivation of Allegretti's well might result in a significant environmental impact and that a focused environmental impact report was required under CEQA. Allegretti appealed this determination to the County Planning Commission.

Between July 1995 and June 1996 the planning commission considered and eventually upheld the decision of the EEC requiring a focused environmental impact

[1] All further section references are to the Codified Ordinances of the County of Imperial, chapter 3.5, unless otherwise indicated.

report before it would consider issuing a permit to reactivate Allegretti's well.

Allegretti provided the planning commission with additional information. In February 1997, the planning commission instructed the EEC to reconsider its previous decision requiring a focused Environmental Impact Report. In March 1997 the EEC did so. It concluded CEQA was applicable to the reactivation of Allegretti's well but declared that a permit could be issued under a mitigated negative declaration. Numerous mitigating measures were required affecting not only the reactivated well but also the operation of the other wells that impacted Allegretti's ability to farm its property.

The planning commission agreed to issue the permit with such conditions. Allegretti appealed to the County Board of Supervisors. The board issued the permit retaining some conditions and deleting others. The permit allowed Allegretti to draw a maximum of 12,000-acre feet of ground water per year from all production wells on the property.

Allegretti's complaint stated a cause of action for inverse condemnation, alleging County was without jurisdiction to require it obtain a permit to pump water on its property and the result of requiring such permit was an unauthorized and uncompensated taking of its property.

2. Demurrer

County demurred to the complaint, alleging that Allegretti had failed to first seek a writ of administrative mandamus and had failed to state a cause of action since County did have the jurisdiction pursuant to the Codified

Ordinances of the County of Imperial, chapter 3.5, to issue a conditional use permit for the reactivation of Allegretti's well.

The trial court granted County's demurrer without leave to amend. It found that with regard to water, Imperial County is located in an arid region and highly dependent on limited sources of water. Under those circumstances, County has the authority to regulate the taking and use of ground water even by overlying users.

DISCUSSION

A. *Petition for Writ of Administrative Mandamus*

County argues that when an inverse condemnation action is based upon a regulatory taking accomplished by an administrative agency, it is necessary it be brought in conjunction with or following a petition for writ of administrative mandamus pursuant to Code of Civil Procedure section 1094.5. (See *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13-21.) County argues Allegretti had 90 days to petition for a writ of administrative mandamus. (Code Civ. Proc., § 1094.6, subd. (b).) Allegretti did not file a petition for a writ within that period, and indeed has never filed such a petition, and its inverse condemnation action is time barred.

Allegretti does not dispute that, in general, a petition for writ of administrative mandamus and compliance with its time limits are required to secure review of an administrative decision like that made here. Instead, it notes that in *Buckley v. California Coastal Com.* (1998) 68 Cal. App. 4th 178, the court held that when an administrative entity is without jurisdiction to make the decision in question, there is no requirement review be sought by means of

administrative mandamus. Allegretti argues County was without such jurisdiction and its action for inverse condemnation is not time barred.

We agree with Allegretti. If County was without jurisdiction to condition the use of Allegretti's well on a limitation on the water extracted, then Allegretti was not required to seek review by means of a petition for writ of administrative mandamus and could seek resolution of the issue of County's jurisdiction by an action for inverse condemnation and/or declaratory relief. (*Buckley v. California Coastal Com., supra,* 68 Cal. App. 4th at p. 191.)

If County was without jurisdiction, then the County's demurrer should have been denied. The resolution of the procedural issue, therefore, turns to the substantive issue of County's jurisdiction over the extraction of ground water.

B. *Authority to Regulate Use of Ground Water*

Allegretti makes two arguments in support of its claim that County had no authority to condition reactivation of its pump on a limitation on the water extracted. It first asserts he has an absolute right to extract that quantity of water reasonably necessary for beneficial use of its property. Allegretti contends no provision of law grants to County the power to limit that right and that in any case an authorization of County to do so would violate the separation of powers doctrine since it would allow an adjudication of property rights solely within the province of the courts. In the alternative, Allegretti contends that even if County theoretically has the power to limit the extraction of ground water, the ordinance under which it purported to do so in this case does not authorize such

action. Allegretti argues a governmental violation of its right to extract ground water is a taking, it is entitled to just compensation and the trial court erred in granting County's demurrer.

1. Power to Limit Extraction of Ground Water

Allegretti is correct when it asserts a property interest in the ground water underlying its land. *(See Tehachapi-Cummings County Water Dist. v. Armstrong* (1975) 49 Cal. App. 3d 992, 1001.) That interest, however, is as subject to the police power of the state as any other property interest and Allegretti's use of the water underlying its property is subject to regulation and control. Such regulatory authority has not been preempted by the state and may be asserted by a county. *(Baldwin v. County of Tehama* (1994) 31 Cal. App. 4th 166, 173, 175-182; see Slater, Vol. 2 *California Water law and Policy*, § 11.07.)[2]

2. Adequacy of Ordinance

Allegretti argues that even if County has the power to regulate ground water, the ordinance under which it purported to do so here was designed only to control the construction of wells and cannot be the basis for the general regulation of ground water including the imposition of extraction limitations. We agree.

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[2] Allegretti also argues that even if County possesses a general right to regulate ground water, it cannot do so by limiting the amount of water it may extract because this would be an *adjudication*, a power vested exclusively in the judiciary. We need not reach this separation of powers issue given our disposition of the case.

a. Ordinance

Section 56350 states the purpose of chapter 3.5. It notes Imperial County is an arid region and that the "preservation and protection of the County's ground water resources are extremely critical." It states that based on this fact, County has "determined to regulate the use, consumption and development of ground water on a County-wide basis." The section states it is further the intent of the Board of Supervisors "to protect the health, safety, and general welfare of the people of Imperial County by insuring that the ground water of this county will not be polluted or contaminated." The section ends by stating: "To this end, minimum requirements have been prescribed in this Ordinance for the construction, re-construction, repair, replacement, re-perforation, re-activation, and/or destruction of wells."

Section 56352 requires a person who intends to drill a new well, re-activate an unused well, increase the pumping capacity of a well, or change the use of a well to obtain a conditional use permit through the County Planning Department.

Section 56353 specifies the information concerning a well project that must be included in the application for a conditional use permit, including, among a host of others, the location of the well on the property, information concerning the well's depth, the pump size and capacity. The section also provides for the inclusion of additional information "as may be necessary to determine if ground water will be adequately protected."

Section 56354 states that the enforcement agency approving the conditional use permit may condition the

permit "in any manner necessary to carry out the purposes of the Ordinance."

Section 56355 states: "The enforcement agency shall deny any application for a permit if, in its judgment, issuance of a permit is not in the public interest or in compliance with the intent of this Ordinance."

Section 56362 states: "The enforcement agency may take such other action as it determines reasonably necessary to protect the degradation of both quantity and quality of any known aquifer resulting from [a well project] or from improper well operations, maintenance, and/or *from excessive* pumping capacity."

b. Discussion

We conclude that based on the purpose stated and the plain meaning of its language, it was the intent of the Imperial County Board of Supervisors in enacting chapter 3.5 to protect both the quality and quantity of County's ground water insofar as it was affected by well construction and operation. The difficulty, however, is that in none of the ordinances we have referenced are there standards by which County regulates actual water usage or advises prospective water users what is or is not permitted with respect to water usage. We are able to discern only one reference, in section 56362, to quantity of water used: "The enforcement agency may take such other action as it determines reasonably necessary to protect the degradation of both quantity and quality of any known aquifer. . . ." This language is so broad as to be meaningless as a regulator of the quantity of water which an overlying landowner can draw for use. Moreover, it does not set forth standards from which we can determine why for example

the 12,000 acre feet of ground water Allegretti seeks to draw is unreasonable given its needs, while some amount less than this quantity would be reasonable. (See *Tehachapi-Cummings County Water Dist. v. Armstrong, supra,* 49 Cal. App. 3d at pp. 1001-1002, 1022.) We find this lack of standards fatal to County's position here.

While it may be that standards do exist for regulating the amount of ground water an overlying user is permitted to remove, and that such standards were applied to Allegretti, the record before us on the demurrer does not contain them.

The judgment is reversed.

/s/ Benke
BENKE, J.

WE CONCUR:

/s/ Work
WORK, ACTING P.J.

/s/ Huffman
HUFFMAN, J.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF IMPERIAL

ALLEGRETTI & COMPANY, Plaintiff, vs. COUNTY OF IMPERIAL, et al., Defendants.	Case No.: 94756 STATEMENT OF DECISION (C.C.P. § 632)

(Filed Jun. 29, 2004)

This cause came on regularly for the bifurcated liability phase of trial on April 7, 8, and 19th, 2004, in Department 9 of this court, the Hon. Jeffrey B. Jones, Judge Presiding, sitting without a jury.

The court, having considered the evidence and heard the arguments of counsel, and having granted defendant's motion for judgment under Code of Civil Procedure §631.8, issues the following statement of decision.

I. Uncontroverted facts.

The court finds the following facts to be uncontroverted:

A. Plaintiff is the owner of property in Imperial County;

B. Plaintiff is an overlying user of the groundwater below its property;

C. Plaintiffs tenant uses the groundwater for the irrigation of crops on the subject property;

D. Plaintiff, and plaintiff's tenant, access the groundwater through the use of wells and pumps;

E. Plaintiff sought a conditional use permit to re-activate a well on the property;

F. Defendant approved the permit on the condition that plaintiff extract no more than 12,000 acre feet per year of water from the aquifer underlying plaintiff's property;

G. Defendant imposed the condition pursuant to County Ordinances, Section 56352; and,

H. Plaintiff did not agree to the conditions imposed for issuance of the conditional use permit.

II. Resolution of Controverted Issues.

A. Was plaintiff required to pursue administrative mandamus?

1. Finding: Plaintiff was not required to pursue administrative mandamus, as Defendant lacked jurisdiction.

The court will take judicial notice of the appellate opinion in D011354. In that matter, the appellate court was called upon to determine if plaintiff was required to pursue a petition for writ of mandate as a condition precedent to seeking damages for inverse condemnation. The court found that plaintiff was not required to pursue a writ. In so finding, the court opined that without more objective standards, defendant was *without jurisdiction* to regulate the amount of groundwater plaintiff could

extract.[1] The appellate court allowed that objective standards might exist, but were not included in the record on appeal.

The above findings, being necessary to the disposition on appeal, are binding on this court under the doctrine of law of the case. *Clemente v. State of California* (1985) 40 Cal.3d 202.

Defendant COUNTY has offered no evidence to show the existence of more specific standards for the regulation of the amount of groundwater extracted. Defendant asserts that such standards exist in other statutes enacted by the California Legislature. As this court has previously found, the court of appeal was presumptively aware of these statutes when it rendered its opinion.

B. Did Defendant's application of §56352 result in a deprivation of all economically viable use of plaintiff's property?

1. Finding: Defendant's application of §56352 did not deprive plaintiff of all economically viable use of its property.

Identification of this issue turns, in large part, on a determination of the essential elements of a claim for inverse condemnation where the government seeks to restrict an owner's use of property while lacking jurisdiction to do so.

---

[1] At page 5 of the opinion the court states "Allegretti argues County was without such jurisdiction and its action for inverse condemnation is not time barred. We agree with Allegretti."

Where the government imposes a *valid* restriction on the use of property, resulting in a temporary or permanent deprivation of all economically viable use of property, the taking is compensable. *First English v. Los Angeles* (1987) 482 U.S. 304.

Where the government acts *without* jurisdiction in imposing a restriction on the use of property, causing a total temporary deprivation of economic use while the issue is litigated, there is no compensable taking. *Landgate v. California Coastal Com.* (1998) 17 Cal.4th 1006.

Unlike in *Landgate,* supra, the plaintiff here has chosen not to pursue declaratory relief; likewise, plaintiff does not seek a writ of mandate. If one treats the regulation as valid, enforceable, and permanent, the case falls within the ruling of *First English* – plaintiff must show a deprivation of all economically viable use. If one treats the regulation as *invalid,* then the case falls within the ambit of *Landgate* – a temporary deprivation of use of the property during litigation regarding the validity of the regulation is not compensable.

Under either scenario, plaintiff cannot prevail. The sole evidence at trial was that a significant portion of the property is farmed by a tenant who is paying rent to plaintiffs – there was no evidence that plaintiff has been denied all viable use of the property.

Moreover, plaintiffs evidence failed to show that the conditions placed on issuance of the permit would have any economic impact at all. COUNTY restricted total groundwater removal to 12,000 acre/feet per year as a condition to re-activating Well No. 3 – plaintiff offered no evidence that it had the ability to extract water in excess of 12,000 acre/feet absent the restriction.

And, defendant's mere erroneous assertion of jurisdiction is not a taking. *Landgate, supra,* at 1027.

C. Has Plaintiff shown that defendant's regulation fails to advance a legitimate state interest?

1. Finding: Plaintiff has failed to show that the regulation fails to advance a legitimate state interest.

The "safe harbor" afforded the government in cases of erroneous assertion of jurisdiction does not exist where the government acts capriciously, or where the regulation does not seek to advance a legitimate state interest. *Buckley v. California Coastal Com.* (1998) 68 Cal. App. 4th 178, 200.

Defendant had a legitimate interest in the regulation of groundwater. As the court of appeal noted "it was the intent of the Imperial County Board of Supervisors in enacting chapter 3.5 to protect both the quality and quantity of County's ground water . . ." Plaintiff has offered no evidence that the defendant acted capriciously, nor that the attempted enforcement of chapter 3.5 was not rationally related to the protection of County's groundwater.

III. Disposition Of Other Issues Identified in Plaintiff's Written Specification of Issues.

As to the other issues specified by plaintiff in its written specification dated April 27, 2004, the court finds that the specified issues seek resolution of evidentiary matters (*People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal. App. 3d 509), or seek the resolution of issues not necessary to the decision (*Vukovich v. Radulovich* (1991) 235 Cal. App. 3d 281).

IV. Conclusion.

Defendant is directed to prepare the judgment in accordance with this statement of decision.

Dated: June 28, 2004

/s/ Jeffrey B. Jones
Hon. Jeffrey B. Jones,
Judge of the Superior Court

Court of Appeal, Fourth Appellate District,
Div. 1 – No. D045156
S143992

IN THE SUPREME COURT OF CALIFORNIA

En Banc

ALLEGRETTI & COMPANY, Plaintiff and Appellant,

v.

COUNTY OF IMPERIAL, Defendant and Respondent.

(Filed Jul. 26, 2006)

Petition for review DENIED.

/s/ George
Chief Justice

No. 06-581

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NOV 17 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ALLEGRETTI & COMPANY,

Petitioner,

v.

COUNTY OF IMPERIAL, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Fourth Appellate District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The real questions presented by this case already have been answered in the negative in prior decisions of this Court:

1. Should a court use a physical takings analysis when considering whether purely regulatory actions (specifically, a county attempting to complete environmental review prior to issuing a well drilling permit, and then offering a modified permit that never actually took effect) created a taking?

2. Should a plaintiff prevail on a categorical regulatory taking claim when that plaintiff continues to profitably use the allegedly taken property?

3. Should a plaintiff prevail on a *Penn Central* regulatory taking claim when it has demonstrated neither the scope of its investment-backed expectations nor that those expectations were reasonable; and also has not shown the extent of any interference with those expectations?

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INTRODUCTION

In rejecting Allegretti and Company's inverse condemnation claim, the California Court of Appeal adhered carefully to the settled principles articulated by this Court in *Lingle v. Chevron USA*, 544 U.S. 528 (2005), *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), and many other cases. That adherence to settled takings law creates no need for further review, and Allegretti's arguments to the contrary are based largely on distortions of both the facts of the case and the legal questions raised.

STATEMENT OF THE CASE

This action arose because Allegretti & Company (Allegretti) applied for a permit to install a new groundwater well on its property, but declined to cooperate in the environmental review procedure that under California state and local law must precede issuance of such permits.

Allegretti owns land in Imperial County, one of the United States' hottest and driest areas. Allegretti leases that land to a tenant farmer, who actively farms the land. That tenant irrigates his crops by pumping groundwater from four on-site groundwater wells. Those wells draw their water from a regional aquifer.

The County never has limited the amount of water those four wells are able to pump. Nor has the County ever

drawn water from the aquifer. Throughout the period that Allegretti identified as the time of the alleged taking, Allegretti's tenant continued to pump water. Allegretti also received rent payments from the tenant and participated in the tenant's profit-sharing plan, which Michael Allegretti described as "very profitable." Respondent's Appendix (in the California Court of Appeal) at 386.

In 1994, Allegretti applied for a conditional use permit to install and operate a fifth well. The County's well drilling ordinance defines approval of a well-drilling permit as a discretionary act and requires the County to comply with the California Environmental Quality Act (CEQA, Cal. Pub. Res. Code, §§ 21000, *et seq.*)[1] before issuing an approval. The County therefore asked Allegretti to cooperate (by providing information about planned pumping levels and existing hydrologic conditions) in the preparation of environmental review.

Allegretti declined to cooperate, and later sued the County (unsuccessfully; the case was dismissed) when the County decided to prepare a full environmental impact report. To resolve the conflict, the County offered Allegretti a compromise: it would issue a permit, but that permit would limit overall levels of pumping from Allegretti's five

[1] Like the National Environmental Policy Act, on which it is partly modeled, CEQA requires state and local government agencies to review the environmental consequences of government actions that may significantly affect the environment, and to do so before those actions are taken. *See* Cal. Pub. Res. Code § 21080(d) (stating that an environmental impact report must be prepared before approving a project that may have significant environmental effects).

wells. The proposed limit – 12,000 acre-feet[2] per year on a 2,400 acre parcel – exceeded the total amount Allegretti claimed to need or want. Allegretti refused to record the permit, which therefore never took effect. Allegretti instead filed this inverse condemnation action against the County.

The County filed a demurrer, alleging that Allegretti was obliged to proceed with a mandamus action rather than an inverse condemnation claim. The trial court sustained the demurrer, but the California Court of Appeal reversed. It held that the County's well-drilling ordinance did not facially recite sufficient standards to allow the County to include pumping limitations in a permit, and remanded for proof beyond the pleadings on that issue. The court also held, however, that California law supported the County's general authority to regulate groundwater. The Court of Appeal did not exempt the County from complying with CEQA prior to issuing a permit, and thus its holding did not empower the County to approve Allegretti's permit application without first completing environmental review.

The case then proceeded to trial, and the trial court rejected Allegretti's inverse condemnation claims, holding that "plaintiff's evidence failed to show that the conditions placed on issuance of the permit would have any economic impact at all." Allegretti's App. at 46. In unanimous decisions, the California Court of Appeal affirmed, and the California Supreme Court denied Allegretti's petition for review.

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[2] An acre-foot of water is enough water to flood one acre of land to a depth of one foot. Thus, Allegretti still would have had enough water to annually flood its entire property five feet deep.

DISCUSSION

In its petition for certiorari, Allegretti asserts no conflict among the decisions of the United States Courts of Appeals; no conflict between a federal appellate court and a state court of last resort; no departure "from the accepted and usual course of judicial proceedings"; no conflict among state courts of last resort; and no conflict between state court decisions and the decisions of this Court. *See* Supreme Court Rule 10. Nor could it, for no such conflicts exist. Allegretti instead rests its request for certiorari entirely on a contention that the court of appeal "decided an important question of federal law that has not been, but should be" settled by this Court. *See id.*

That contention is groundless. As discussed below, and as evinced by its carefully written opinion, the court of appeal carefully adhered to well-established legal principles.

I. The California Court of Appeal Followed Established Principles in Rejecting Allegretti's Physical Takings Claim

Allegretti's first asserted basis for review – its request for the Court to reject "the simplistic conclusion that takings claims are either 'regulatory' or 'physical,'" – ignores the well-settled principles that led the California courts to reject Allegretti's physical taking claim.[3]

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[3] Allegretti's framing of the question – "when property owners' right of access to water beneath their land is substantially abrogated by a government agency, is the resulting taking measured . . . " – also assumes several unsupportable factual and legal premises. *See* Petition at 1. Allegretti never actually showed that its right of access to water

(Continued on following page)

In *Tahoe-Sierra Preservation Council*, the Court cautioned that the difference between physical and regulatory takings "makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa." 535 U.S. at 323-24; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (using a regulatory takings analysis to evaluate a regulation that denied a plaintiff all economically viable use of his entire property, and noting that physical takings fell into a separate "discrete categor[y]"); *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.") (emphasis in original).

That distinction is particularly important here, for the County has never done anything that fits within the traditional definition of a physical occupation or invasion. It has not appropriated Allegretti's water, physically occupied or invaded the aquifer, established any physical presence on Allegretti's property, or enabled a third party to do so. Its actions were classically regulatory restrictions on use; it required Allegretti to obtain a permit and then offered a modified permit in response to Allegretti's unwillingness to cooperate in environmental review. No authoritative federal or state decision supports Allegretti's attempt to treat those routine regulatory actions as

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beneath its land was "substantially abrogated." *See* Part III, *infra*. Nor did it ever demonstrate the existence of a "resulting taking."

physical takings, and the court of appeal followed settled law in rejecting that attempt.[4]

II. The California Court of Appeal Followed Established Principles in Rejecting Allegretti's Categorical Regulatory Taking Claim

Allegretti next asserts that the Court must assess whether Allegretti, which continued to profitably use the supposedly taken property, suffered a *categorical* regulatory taking. But in rejecting that theory, the Court of Appeal again followed well-established law.

Only in those rare circumstances where a regulation permanently denies a property owner "*all* economically beneficial or productive use" of its property may the regulation effect a categorical taking. *Lucas*, 505 U.S. at 1015 (emphasis added). The Court's use of the word "all" is not coincidental; it has cautioned that "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in *Penn Central*" rather than application of the *Lucas* categorical test. *Tahoe Sierra Preservation Council*, 535 U.S. at 330 (quoting *Lucas*, 505 U.S. at 1017, 1019-20 & n.8). Consequently,

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[4] Allegretti attempts to manufacture a cert-worthy conflict out of one anomalous decision of the Federal Court of Claims, *see Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 (2001), but that decision has no precedential value and thus is incapable of creating any conflict of authority. The Court of Claims itself has neutralized that decision by rejecting its analysis. *See Klamath Irrigation District v. United States*, 67 Fed. Cl. 504, 538-40 (2005). But Allegretti's petition, though it repeatedly cites and heavily relies upon *Tulare Lake*, incongruously fails even to mention *Klamath Irrigation District*.

a categorical regulatory taking arises only in an "extraordinary circumstance." *Id.*

This case presented no such extraordinary circumstance. Allegretti received both profit-sharing and rent payments throughout the period of the alleged taking. It has always had access to as much water as its four existing wells could pump. To hold, under such circumstances, that Allegretti was denied "all economically viable use" of its property would render that phrase meaningless.

III. The California Court of Appeal Followed Established Principles in Rejecting Allegretti's *Penn Central* Regulatory Taking Claim

In challenging the California court's *Penn Central* analysis, Allegretti contends that the Supreme Court should use this case to refine the meaning of the phrase "investment-backed expectations." But even if one assumes, *arguendo*, that such refinement is needed, this is not the case to provide it. Allegretti failed to demonstrate what its investment-backed expectations were, whether its expectations were reasonable, and the extent, if any, to which the County's actions interfered with those expectations. Accordingly, the Court of Appeal's application of the second prong of the *Penn Central* analysis was also entirely consistent with settled law.

Allegretti never clarified the scope of its expectations. Instead, as the Court of Appeal explained, "Joe Allegretti's testimony was only that he purchased the farm having been given lots of reassurances that it *could* be a viable farming operation." Allegretti's App. at 21 (emphasis in original). At the trial itself, Michael Allegretti specifically testified that when asked how much water Allegretti

expected to use, "I told different amounts at different times." Reporter's Transcript at 240:13-15. Accordingly, the court of appeal's demand for more specific evidence simply applied traditional legal standards and requires no correction from this Court. *See* Allegretti's App. at 21 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984)).

Nor did Allegretti demonstrate that its unspecified, inchoate expectations were reasonable. Based on Allegretti's subsequent litigation posture, and on its failure to even attempt to prove the scope of its groundwater use rights, Allegretti may have expected to pump without any regulatory constraint. But because of both long-established law and the realities of an arid and variable climate, all California water use rights are necessarily "limited and uncertain." *United States v. California State Water Resources Control Board*, 182 Cal.App.3d 82, 104 (1986); Cal. Const. art. X § 2 (limiting rights to uses that are "reasonable"). Groundwater use rights are further constrained by the requirement that no user can take more than its "proportionate fair share" of the waters in a shared aquifer, *City of Barstow v. Mojave Water Agency*, 23 Cal.4th 1224, 1253 (2000). California counties may also impose limits designed to protect scarce groundwater resources. *In re Maas*, 219 Cal. 422, 424-25 (1933); *Baldwin v. County of Tehama*, 31 Cal.App.4th 166 (1994). For those reasons, Allegretti could not reasonably anticipate limitless pumping from a shared desert aquifer – particularly where, as Allegretti's own consultant acknowledged, water levels in that aquifer were steadily declining. *See* Respondent's Appendix at 257-58 (documenting the drawdown); *Pasadena v. Alhambra*, 33 Cal.2d 908 (1949)

(holding that a user may be enjoined from taking more than an aquifer's safe yield).

Having demonstrated neither what its expectations were nor why they were reasonable, Allegretti failed to establish any interference with reasonable investment-backed expectations. The 12,000 acre-feet per year limitation the County proposed never actually took effect, and even if it had, that limitation would have exceeded Allegretti's claimed water needs. *See* Allegretti's App. at 4-5 (explaining that Allegretti sought only a modest increase in its farming acreage). Similarly, directing Allegretti to comply with standard permitting requirements could not interfere with reasonable expectations, for Allegretti could not reasonably assume the County would grant a permit without first complying with the mandates of applicable law.

This case therefore creates no need for the Court to reject the court of appeal's routine application of the *Penn Central* standard, or to revisit the meaning of "reasonable investment-backed expectations." Under any plausible interpretation and application of that phrase, the court of appeal's decision was correct, and indeed was compelled by the facts of this case.

CONCLUSION

Supreme Court Rule 10 cautions that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Yet those are the types of claims Allegretti's petition asserts, and its contentions of misapplication, like its factual assertions, lack foundation. The California

courts carefully adhered to settled legal standards and correctly applied those standards to facts that could not, under any reasonable analysis, sustain a takings claim. That adherence to settled law creates no need for this Court's review.

Respectfully submitted,

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NO. 06-581

In The
Supreme Court Of The United States

ALLEGRETTI & COMPANY,

Petitioner,

vs.

COUNTY OF IMPERIAL, CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The Court of Appeal of the State of California,
Fourth Appellate District, Division One

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Imperial County could not even draft the first two pages of its Brief in Opposition without demonstrating tellingly the need for this Court's intervention. First, it refuses to deal with the facts shown in the opinions below and makes up other facts that are easier to deal with. Second, it can respond to the Questions Presented only by ignoring the Questions Presented in the Petition and making up its own straw creatures with which to deal. Neither ploy should detract from the need for this Court to grant certiorari to settle important issues that are continuing to spread confusion in the lower courts.

On a factual level, the County is simply wrong in asserting that Allegretti sought "to install a new groundwater well" and then "declined to cooperate in the environmental review . . ." (Br. in Opp. 1.) That is not this case. It was not a new well, but reactivation of an existing well. (Pet. App. 44.) And Allegretti did not "decline" cooperation, but provided voluminous information. On the first appeal of this matter, the Court of Appeal reversed a judgment in the County's favor, "agree[ing] with Allegretti" (Pet. App. 38) that the County lacked jurisdiction to regulate the amount of water removed from the aquifer, but giving the County a chance on remand to provide additional evidence – including, presumably, environmental evidence – that would show otherwise (Pet. App. 42). On remand, the County stipulated that it had no additional statutes, regulations, or other evidence to present.

On an issues level, the County apparently believes that if it ignores – at this procedural stage – the importance

of the water rights underlying this Petition then the issues will magically vanish. The County knows better – as the record below amply demonstrates. As shown by the numerous letters sent to the California Court of Appeal urging publication of the opinion *for the precise purpose of developing a line of authority that would conflict with existing published authority* – requests that came from organizations across the country, including the Planning and Conservation League, the Natural Resources Defense Council, and the Georgetown Environmental Policy Institute – this case raises issues of serious national legal import. Those issues merit vetting in this Court.

I

THE COUNTY'S BRIEF IN OPPOSITION CONFIRMS THE EXISTING CONFLICT ABOUT PHYSICAL TAKING ANALYSIS OF WATER ACCESS CASES

The Petition shows the conflicting approaches to analyzing government approaches to abrogating or interfering with private water rights. (See Pet. 6-9; see also Brief Amicus Curiae of Pacific Legal Foundation.) Different analytical models have evolved:

> — Item: Because the right of access to flowing water is in constant flux (i.e., the water that is there today will be gone tomorrow), interference with the right of access is more properly analyzed as a physical taking rather than a regulatory taking. (*Tulare Lake Basin Water Storage Dist. v. United States*, 49 Fed. Cl. 313 [2001].)

> — Item: Impoundment of water, so that those who are otherwise entitled to it cannot reach it, is a physical taking. (*International Paper Co. v. United States*, 282 U.S. 399 [1931]; *Dugan v. Rank*, 372 U.S. 609 [1963].)
>
> — Item: Action taken in the guise of regulation that in fact abrogates property owners' right of access to water beneath their own land can never be viewed as a physical taking. (The case that is the subject of this Petition. [Pet. App. 1].)

In response, the County ignores the problem, noting only that physical takings and regulatory takings are different. (Br. in Opp. 5.) So stipulated. So what? The question is how to analyze water rights cases and deal with the growing legal confusion evidenced by the lower court decisions and commentary (both legal and popular) collected in the Petition. On that issue, the County is silent.

The County's only noteworthy contribution is its citation of *another conflicting case*. The County calls the Court's attention to *Klamath Irr. Dist. v. United States*, 67 Fed. Cl. 504 (2005) which chose expressly to disagree with the decision in *Tulare Lake*. (Br. in Opp. 6, n. 4.) Contrary to the County's assertion, *Klamath* did not "neutralize[]" *Tulare Lake*, it only heightened the conflict in published case law.

Certiorari is needed to resolve these conflicts.

II

THE COUNTY'S BRIEF IN OPPOSITION FAILS TO DEAL WITH THE SUBSTANTIAL REGULATORY TAKING ISSUES PRESENTED BY THE PETITION

The Petition amply showed the confusion that this Court's regulatory taking decisions is still causing both in lower judicial and academic circles. Despite the number of cases reciting general precepts, there are few concrete rules to help regulators, property owners and courts analyze real cases and decide how to prove – or disprove – that a regulatory taking has occurred.

When key terms in this Court's regulatory taking jurisprudence – terms like "economically viable [or productive or beneficial] use" and "investment-backed expectations" – terms that are at the heart of issues that must be examined in such cases, are left in a state of uncertainty then what results is anarchy.

The level of uncertainty was shown in the materials quoted in the Petition from both judicial opinions and scholarly commentaries. (Pet. 5-6, 11-18.) As shown there, others have concluded the existing case law results in a "virtually standardless inquiry," an "elusive" definition with "uncertain" meaning, a question whether key terms have "any intrinsic meaning at all," raising "one of the trickiest and slipperiest parts of land use law," leaving government regulators to act "according to gut feeling in the individual case, instead of by rule of law."

That is not an acceptable situation.

The County's response? Silence. The County blandly asserts that the California courts "followed established principles" (Br. in Opp. 6, 7) without examining those "established principles" in light of the criticisms tartly leveled against their exposition by most of those who have tried to make sense of this field of the law.

The problem is not so much with the "established principles" as it is with the near total absence of guidance on how to apply them. That is where the case at bench comes in. For example, the County criticizes the evidence presented by Allegretti to prove its investment-backed expectations for use of the land. (Br. in Opp. 7.) What the Petition seeks is guidance from this Court – to date, there has been none, either from this Court or lower courts – as to the kind of proof that is needed to establish that criterion. Allegretti believes that sufficient evidence was presented. The County disagrees. That shows how this case can be useful in helping this Court help the lower courts and litigants understand the meaning of the general phrases that predominate in its regulatory taking cases and which lower courts and litigants have not been able to apply.

The law of regulatory takings needs this Court's guidance. Allegretti's purchase and anticipated use of 2,400 acres of farm land in an agricultural area – and overlying its own underground water supply – provides an apt subject for examination and explication.

CONCLUSION

This case presents serious constitutional issues involving both water law and takings law. The cases in which they arise have increased in recent years and promise to continue doing so. As plainly stated by the State and National organizations that succeeded in obtaining publication of the opinion below, there are numerous cases either pending or contemplated where the clash between this case and *Tulare Lake* will be presented – with a deliberate eye to asking the courts to choose one or the other. It is preferable for the Court to deal with the issue now, when it is plainly presented, rather than allow confusion to proliferate.

Petitioner prays that Certiorari be granted.

Respectfully submitted,

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In the

Supreme Court of the United States

ALLEGRETTI & COMPANY,

Petitioner,

v.

IMPERIAL COUNTY, CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California, Fourth Appellate District, Division One

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF ALLEGRETTI & COMPANY'S PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. When property owners' right of access to water beneath their own land is substantially abrogated by a government agency, is the resulting taking measured by regulatory taking standards (as held below) or is it more aptly "characterized as a physical invasion" (as held in a decision of the U.S. Court of Federal Claims, applying *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978))?

2. When regulatory action denies property owners the use of the substantial bulk of their land by denying them use of their own water rights—necessary for irrigation in the arid California climate—has there been a denial of "all economically viable or productive or beneficial use" even though a small portion of the land can still be used? Does such a denial unconstitutionally interfere with the owners' "distinct, investment-backed expectations" for use of the land which is, and always has been, agricultural? What are the standards for litigating each issue?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation (PLF)[1] submits this brief *amicus curiae* in support of Allegretti & Company's petition for a writ of *certiorari*. Written consent for amicus participation in this case was granted by counsel of record for all parties. Letters of consent have been lodged with the clerk of the Court.

PLF is the largest and most experienced nonprofit, public-interest law foundation of its kind in the United States, incorporated for the purpose of litigating in the public interest. For more than 30 years, PLF has been litigating in support of the rights of individuals to make reasonable use of their private property free of unnecessarily intrusive government interference, and has advocated in favor of maintaining a reasonable balance between government efforts to protect the environment and the other necessary and proper functions of government and of free society. PLF supports the concept of limited government, the maintenance of an appropriate balance between federal and state power, and the principle that the environment must be protected in a manner that is consistent with the other needs of American society.

PLF attorneys have on several occasions appeared before this Court to interpret and defend property rights protected by the United States Constitution. PLF attorneys were counsel of record in landmark property rights cases before this Court, including *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

This case has tremendous implications for the ability of Californians and residents of other arid states to invest in and ensure a stable supply of groundwater. Without adequate protection for property rights in groundwater, this resource will become increasingly insecure—at a time when reliance upon groundwater as a fundamental water source, and thus the need of a secure supply, is both significant and growing.

Groundwater—and the rights to use groundwater for agricultural, industrial, recreational, household, or other purposes—is a matter of great moment in the arid American West. In California, for instance, groundwater constitutes about 30 percent of the state's water supply, rising to 60 percent in some areas. *See* California Department of Natural Resources, *California's Groundwater*, Bulletin 118: 2003 Update, at 2. Some 40 to 50 percent of Californians rely on groundwater as part of their water supply. *Id.* An estimated 14.5 million acre-feet of groundwater were extracted in California in 1995 for these productive purposes. *Id.* at 20. And this use is growing; in the 14 years between 1987 and 2003, an average of more than 9,000 wells per year were constructed, reconditioned, or deepened. *Id.* at 27.

In submitting this brief in support of Petitioner's request that this Court grant *certiorari*, PLF addresses only the first of the two questions presented to this Court—whether the County's restriction on Allegretti's pumping activities worked a physical taking of his water rights. It takes no position herein with regard to whether the County's restrictions also worked a regulatory taking of the water rights.

SUMMARY OF THE ARGUMENT

Pursuant to a county ordinance, Imperial County, California, restricted Allegretti & Company's (Allegretti's) established usufruct right to water property and its right to occupy its subjacent property. Allegretti sued, alleging inverse condemnation on both physical and regulatory takings theories.

A California state court of appeal concluded that the ordinance, which restricted the amount of groundwater Allegretti could extract from beneath its property to 12,000 acre/feet per year, was not a compensable taking under either theory. The Supreme Court of California declined to review that decision.

In reaching its conclusion, the court of appeal unduly limited the application of this Court's physical-takings decisions. It then concluded that the County's restrictions on Allegretti's groundwater-pumping operations did not constitute a physical taking.

In fact, the court's decision directly conflicts with this Court's holdings in cases including *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Dugan v. Rank*, 372 U.S. 609 (1963), *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), and *International Paper Co. v. United States*, 282 U.S. 399 (1931). When the holdings of those cases are applied to the facts at bar, it becomes clear that the County's actions effected a physical taking of Allegretti's property rights. In particular, the County prohibited extraction and beneficial use of groundwater in excess of 12,000 acre/feet per year—despite the fact that the California Constitution and settled law protect Allegretti's right to put this water to beneficial use. In finding that no physical taking had occurred, the court of appeal's decision conflicts with the teachings of this Court, and works a violation of Allegretti's Fifth Amendment right to compensation for government taking of private property.

In addition to the conflicts created by the decision below, this case presents questions of national importance, namely, the extent to which government can deprive property owners from full use of the groundwater beneath the land. Farmers, municipalities, water agencies, developers, environmental interests, and all other water users rely on set and stable rules

governing water management. Especially where water is scarce —as in many parts of California and other Western states— these set and stable rules are necessary for the most efficient and rational use of the commodity. This Court should grant certiorari to establish a foundation of secure and stable water—access rights and the corollary requirement of prompt payment of just compensation for governmental taking of those rights. Specifically, this Court should grant certiorari to confirm that the government cannot abrogate property rights established under state law. In other words, government cannot acquire water flowing beneath private property, by means of restricting the property owner's water extraction rights, without paying just compensation.

Because the California court "decided an important federal question in a way that conflicts with relevant decisions of this Court," in a matter of significant constitutional, legal, and practical importance that puts a vital liberty interest at stake, compelling reasons exist for this Court to grant *certiorari*. Supreme Court Rule 10(c).

ARGUMENT: THE *ALLEGRETTI* DECISION CONFLICTS WITH THIS COURT'S DECISIONS BY HOLDING THAT THE COUNTY DID NOT TAKE ALLEGRETTI'S WATER RIGHTS

This Court should grant *certiorari* in this matter because the California court's decision in *Allegretti & Co. v. County of Imperial*, 138 Cal. App. 4th 1261 (2006), conflicts with a series of decisions by this Court in its conclusion that Imperial County did not effect a physical taking of Allegretti's water rights.[2]

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[2] The treatment of water rights under the Takings Clause is the subject of increasing controversy. *See, e.g., Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313, 314-15, 318-20 (2001) (recognizing a compensable physical taking when (continued...)

In California, a property owner enjoys a right to extract groundwater underlying the ground that he owns. These overlying groundwater rights are usufructuary, in that they confer " 'the legal right to use the water that is superior to all other users.' " *Allegretti*, 138 Cal. App. 4th at 1271 n.5 (quoting *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 860 (Cal. 2000)). When municipalities use groundwater they do so as appropriators, and as such their rights are strictly measured by the law governing appropriators. *See Orange County Water Dist. v. City of Riverside*, 343 P.2d 450, 464 (Cal. Ct. App. 1959). Thus, when a county commandeers groundwater for its own purposes, as against the intended use by an overlying owner, it interferes with the water rights of a superior user.

The court below found no compensable taking of Allegretti's water rights to result from the County's restriction on Allegretti's pumping efforts. This finding conflicts with this Court's physical takings cases, the application of which would result in a finding that the County had worked a physical taking of Allegretti's property right to use the groundwater under its soil for its own beneficial purposes. Essentially, the California

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[2] (...continued)
federal government restricted a storage district's property right to use waters in order to protect endangered species); *Hage v. United States*, 51 Fed. Cl. 570, 572-74, 584 (2002) (finding a compensable physical taking because the government denied plaintiffs access to their vested water rights in waters surrounded by federal lands); *Klamath Irrigation District v. United States*, 67 Fed. Cl. 504, 538 (2005) (finding *Tulare Lake* wrong in some relevant respects); Jesse W. Barton, *Tulare Lake Basin Water Storage District v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 Environs Envtl. L. & Pol'y J. 109 (2002) (supporting *Tulare Lake*); Melinda Harm Benson, *The Tulare Case: Water Rights, the Endangered Species Act, and the Fifth Amendment*, 32 Envtl. L. 551 (2002) (opposing *Tulare Lake*).

court held that *no* taking of a usufruct right in California works a physical taking. This conclusion, too, conflicts with this Court's precedent.

The decision below purports to rely on this Court's precedent in its conclusion that the County's restrictions do not work a physical taking of Allegretti's water rights.

The facts at bar, though, are materially indistinguishable from the facts of this Court's physical invasion cases. For example, in *Dugan v. Rank*, 372 U.S. 609, this Court found that the federal government had effected a taking when it extinguished the use rights of various water districts by diminishing their access to the water of the San Joaquin River by collecting it behind Friant Dam. *See Dugan*, 372 U.S. at 613-14. The *Dugan* Court explained that

> [t]he right claimed here is to the continued flow of water . . . and to its use[.] A seizure of water rights need not necessarily be a physical invasion of land. . . . Interference with or partial taking of water rights in the manner it was accomplished here might be analogized to interference or partial taking of air space over land [Citations omitted.] Therefore, when the Government acted here with the purpose and effect of subordinating the respondents' water rights to the Project's uses whenever it saw fit, with the result of depriving the owner of its profitable use, there was the imposition of such a servitude as would constitute an appropriation of property for which compensation should be made.

Id. at 625 (internal quotation marks and parentheses omitted).

In this case, as in *Dugan*, the government impounded water, thus cutting off water-right holders' access to the flow of the relevant water in order to make some other use of it. The only distinction, as discussed *infra*, is that in the case at bar the

County has added insult to injury by impounding the water *on the usufruct right-holder's own land.*

The court below, however, rejected this straightforward result. It rightly noted that in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, this Court considered the limited context in which a government's restriction of a property owner's usufruct rights in its subjacent property would not give rise to just-compensation liability. The lower court's conclusion that the facts at bar constitute such an instance, however, conflicts with this Court's actual holdings in *Loretto* and other relevant cases. In *United States v. Central Eureka Mining Co.*, 357 U.S. 155, reviewed and relied upon in *Loretto*, this Court found no taking where the Government had issued a wartime order requiring nonessential gold mines to cease operations for the duration of the Second World War, for the purpose of conserving equipment and manpower for use in mines more essential to the war effort.

As the *Central Eureka* decision explained, the directive that temporarily closed the mines arose because

> the WPB [War Production Board] made a reasoned decision that, under existing circumstances, the Nation's need was such that the unrestricted use of mining equipment and manpower in gold mines was so wasteful of wartime resources that it must be temporarily suspended. . . . In the context of war, we have been reluctant to find that degree of regulation which, without saying so, requires compensation to be paid for resulting losses of income. The reasons are plain. War, particularly in modern times, demands the strict regulation of nearly all resources. *It makes demands which otherwise would be insufferable.* But wartime economic restrictions, *temporary in character*, are insignificant when compared to the widespread uncompensated

> loss of life and freedom of action which war traditionally demands.

Central Eureka, 357 U.S. at 168 (emp. added; citations omitted). As the *Loretto* Court summarized, "the temporary though severe restriction on *use* of the mines was justified by the exigency of war." *Loretto*, 458 U.S. at 432.

While this Court may have tightened the requirements to claim a physical takings during wartime, the California court found no taking where the County has no such exigency.

Similarly, this Court found no physical taking in *Central Eureka* because the restriction against mining the gold was temporary. The California court, to the contrary, excused the *permanent* restrictions by the County. And the gold in Central Eureka's mines was not lost as a result of the WPB's mining restrictions; it was simply left in place for the duration of the war. The water that Allegretti has been restricted from bringing to the surface, however, is lost to Allegretti forever. Unlike the deposit of gold in a gold mine, which can be mined at a later date, the flow of water from an aquifer cannot be pumped in the future.

It follows that a temporary restriction in *Central Eureka* of the extractive right to use gold in a gold mine is *less* problematic, not more, than even a temporary restriction of that same extractive right in an aquifer.

The *Allegretti* court's remaining justifications for its no-taking conclusion are equally at odds with this Court's instruction, and the conflict is apparent on the face of the court's own opinion. It asserted that "our highest court has found a physical taking" of water rights "where the government diverted water for its own consumptive use or decreased the amount of water accessible by the owner of the water rights." *Allegretti*, 138 Cal. App. 4th at 1273. The court made no effort to deny that the County's actions "decreased the amount of

water accessible by" Allegretti, which under this Court's doctrine makes this a case of physical taking.

Moreover, by application of this Court's doctrine, the County also did "divert[] water for its own consumptive use" by diverting the water from Allegretti's planned stream (i.e., through the refurbished pump and onto its property as irrigation water) for its own use (i.e., keeping the water in the ground). In *Dugan*, 372 U.S. at 613-14, the government caught water behind a dam, diverting it. In *International Paper Co. v. United States*, 282 U.S. at 406, the government's diversion arose from the issuance of an order that allowed a power plant to draw the whole of a river's flow. This was to the detriment of a paper mill that held rights to take some of that flow, while the government stood to gain some collateral benefit from increasing the power plant's draw. The facts here are analogous: the County has issued an order that curtails Allegretti's ability to draw water to which it has a right. And while the government will not physically "use" the water (in the same way that the *government* did not use the water in *International Paper*), the water is being put to a use that the government desires. Under this Court's precedent, then, the County has "diverted for its own consumptive use."[3] By

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[3] The court cannot be asserting that the County avoids responsibility for having effected a physical taking because the County's use of the water is wholly unproductive and not economically beneficial. This purposelessness could hardly *insulate* the County's conduct in California, given that the state-constitutional protection of usufruct water rights *requires* that water be put to productive use. *See* Cal. Const. art. X, § 2 ("[T]he general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . ."). And this would make for very bad doctrine indeed: if government restrictions on property use are purposive, they may be takings; but if they are arbitrary and unexplained, they are not.

reaching the contrary conclusion, the California court's decision conflicts with this Court's holding.

After conflicting with this Court's holdings in its reasoning, the court below similarly conflicted with this Court in its conclusion.

> County's action with respect to Allegretti in the present case—imposition of a permit condition limiting the total quantity of groundwater available for Allegretti's use—cannot be characterized as or analogized to the kinds of permanent physical occupancies or invasions sufficient to constitute a categorical physical taking. The County did not physically encroach on Allegretti's property or aquifer and did not require or authorize any encroachment (e.g. *Yee v. City of Escondido, supra,* 503 U.S. 519, 527, 112 S. Ct. 1522); it did not appropriate, impound or divert any water. The County's permit decision does not effect a *per se* physical taking under any reasonable analysis.

Allegretti, 138 Cal. App. 4th at 1273.

As an initial matter, a sound argument can be made that the County's actions did permanently physically encroach upon and invade Allegretti's subjacent estate. Water in California (as distinguished from the *use* of water) is publicly owned. *See Allegretti*, 138 Cal. App. 4th at 1271 n.5 (quoting *Mojave Water Agency*, 5 P.3d at 860; *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.*, 109 Cal. App. 4th 891, 905 (2003)). By refusing to permit Allegretti to remove the publicly owned water in excess of 12,000 acre/feet per year from the subjacent part of Allegretti's property, the County ensured that the public's water would permanently encroach upon that property. Moreover, *Dugan* demonstrates plainly that physical occupations, invasions or encroachments

are wholly unnecessary to the finding of a *per se* taking. *See, supra*, at 6-7.

Thus the court's sole remaining explanation of why the County's actions did not work a physical taking of Allegretti's usufruct water rights is that the County "did not appropriate, impound or divert any water." In fact, however, the County did *impound* the groundwater in the ground, proscribing its removal to a different locale. For all practical purposes, this impoundment *diverted* the water from Allegretti's intended beneficial use (irrigation). It worked a legal diversion that is functionally indistinguishable, from Allegretti's perspective, from the diversions of water away from the owners of the water rights at issue in *Dugan* and *International Paper*. And as in those cases, the effect of the County's action here was to *appropriate* the diverted water for the use that it, the government diverter, preferred—here, keeping it in the ground. *See, e.g.*, *Dugan*, 372 U.S. at 613-14; *Int'l Paper*, 282 U.S. at 406. Once again, then, the California court's conclusion that the County's restriction on Allegretti's pumping activities did not work a physical taking places it at odds with this Court.

A faithful application of this Court's precedent to the facts below requires a finding that the County's action worked a physical taking of Allegretti's usufruct groundwater rights. To achieve the contrary result, the court below repeatedly conflicts with that precedent. Most starkly, the *Allegretti* court's decision, if allowed to stand by this Court, will establish the proposition in California that there is simply no such thing as a physical taking of a usufruct right. Because all usufruct rights are by definition rights to use, and because, by the *Allegretti* court's definition, *Allegretti*, 138 Cal. App. 4th at 1271-74, restrictions of use rights are "regulations," all denials of usufruct rights are, at most, regulatory takings. Because this proposition stands in square opposition to the holdings of *Loretto*, *Dugan*, and a host of other decisions of this Court, and would greatly diminish the liberties protected by the Fifth

Amendment of the United States Constitution, Amicus PLF urges the Court to grant *certiorari*.

CONCLUSION

Beneficial use of water becomes an ever-increasingly important public-policy goal as the pressures on American, and particularly western, water resources increase. Property rights, especially property rights to the use of water itself, are an important safeguard of and incentive to efficient beneficial use; confusion about the extent and efficacy of usufruct water rights can only endanger the goal of wise and beneficial use. The California court's decision reaches conclusions about both real-property rights and usufruct water rights that are at odds with the very body of this Court's property-right precedent upon which it purports to rely. This case represents an important opportunity for the Court to elaborate vital doctrines of property and water law. This Court should grant Allegretti's petition for *certiorari*.

DATED: November, 2006.

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AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I respectfully request that this Court grant review of *Allegretti & Company v. County of Imperial,* 138 Cal.App.4th 1261. The parties have consented to the filing of this amicus curiae brief by filing their blanket consent letter with the Court.[1]

The power of eminent domain is a formidable one, and in order for attorneys such as myself to be able to properly counsel their clients, we need more guidance than current case law contains. As an active eminent domain practitioner, I am aware of the serious issues that have yet to be answered in the eminent domain field. In particular, I and my clients have struggled with each of the issues raised in the *Allegretti*, including (1) how to determine the

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[1] Amicus states that he authored and paid for this brief. This brief was not written in whole or in part by counsel for a party, and no one other than amicus made a monetary contribution to its preparation. (Supreme Court Rule 37.6.)

meaning of loss of "all economically viable use," (2) how to prove the impairment of "distinct" investment-backed expectations", and (3) how to reconcile the rules of *Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761 (with its holding that the receipt of rent and the absence of physical invasion do not negate the existence of a taking) with cases like *Allegretti*, with their holdings that the receipt of income precludes the finding of a taking.

Moreover, as the State's population grows, the ability of property owners to use the water beneath their own land becomes more important. So, too, is the extent to which the government can regulate that use without violating either the constitutional mandate to put water to beneficial use or the constitutional protection of private property rights.

One of my current cases involves water rights on the San Joaquin Delta, where my client is losing those rights as the result of the Bethel Island bridge reconstruction. On other cases, the deciding issue is what constitutes a "loss of all economically viable use" of the subject property. On behalf of those clients, I request that the Court grant review of *Allegretti.*

When a client consults me regarding regulatory takings, the issue often is what constitutes a loss of "all economically viable use" of the specific property. Does any use mean an economically viable use? What is the standard? Is the standard a reasonableness test, or one specific to the owner of the property? And, who has the burden of proof on this issue?

Currently, I must answer the client's question "has the government action prevented all economically viable use of my property" with "we have to file suit, and we'll both find out together."

Filing suit is an unreasonable way to answer the question. It is also a costly method for the client, the agency, and the judiciary.

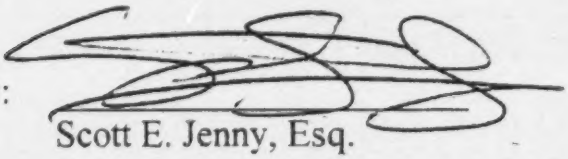
There are no criteria to explain the parameters of "economic viability." There is simply no judicial guidance to help me answer that question short of litigation. I ask for guidance from this Court, so that I am able to give more guidance to my clients.

Furthermore, apart from these specific clients, I have a strong interest in the development of a clear, consistent body of eminent domain law, and on that basis also request a grant of review.

On behalf of my clients, and the pursuit of a consistent body of eminent domain law, I respectfully request that this Court grant review of *Allegretti.*

Respectfully submitted,

JENNY, JENNY & JENNY, LLP

By: 

Scott E. Jenny, Esq.

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October 30, 2006

William K. Suter, Clerk
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543-0001

Re: Allegretti v. County of Imperial
No. 06-581

Dear Mr. Suter:

Petitioner and Respondent, through their respective Counsel of Record, hereby provide blanket consent to the filing of amicus curiae briefs in support of or in opposition to the Petition for Writ of Certiorari in the above-entitled case.

Sincerely,

Michael M. Berger
Counsel of Record for Petitioner
Allegretti and Company

Antonio Rossmann
Counsel of Record for Respondent
County of Imperial, California

COPY
original sent
11/2/06

PROOF OF SERVICE – C.C.P. 1013a, 2015.5

I declare:

I am employed in the City of Martinez, Contra Costa County, State of California. I am over the age of 18 years and not a party to the within action. My business address is 706 Main Street, Suite C, Martinez, California 94553.

On November 22, 2006 I served the foregoing document described as: AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI by placing a true copy thereof in a sealed envelope addressed as stated below:

Michael M. Berger
Manatt, Phelps & Phillips LLP
11355 W. Olympic Blvd.
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Antonio Rossmann
Rossmann & Moore
380 Hayes Street
San Francisco CA 94102

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940 West Main Street, Suite 205
El Centro CA 92243

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600 "B" Street, Suite 2300
San Diego CA 92101

X (BY MAIL) I am readily familiar with the practice of this firm for the collection and processing of correspondence for mailing with the United States Postal Service and such envelope was placed for collection and mailing on the above date according to the ordinary practice of Jenny, Jenny & Jenny.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on November 22, 2006 at Martinez, California.

Richard K. Jenny

(6)

Supreme Court, U.S.
FILED
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No. 06-581

IN THE
Supreme Court of the United States

ALLEGRETTI & COMPANY,

Petitioner,

v.

COUNTY OF IMPERIAL, CALIFORNIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE

AMICUS CURIAE BRIEF OF THE WESTERN MANUFACTURED HOME ASSOCIATION ("WMA") IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY ALLEGRETTI & COMPANY

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I. THE WESTERN MANUFACTURED HOME ASSOCIATION ("WMA") IS AN ORGANIZATION COMPRISED OF THE OWNERS OF MOBILE-HOME PARKS THROUGHOUT CALIFORNIA, AS WELL AS OTHER WESTERN STATES.

WMA is a trade association whose members are largely Mobilehome Park Owners who, collectively, own, operate and control over 175,000 mobilehome spaces in California alone. WMA has over 1800 member parks. WMA provides services for its members and participates, on an intermittent basis, as amicus in litigation that may have a substantial impact upon the mobilehome park industry. Attached as Appendix A is a true and correct copy of the letter from Petitioner and Respondent setting further their consent to this amicus brief being filed.

WMA respectfully requests and suggests that this court should grant the Petition for Writ of Certiorari in the above-referenced matter. Review should be granted because the issues raised in the Petition involving the Fifth and Fourteenth Amendments of the United States Constitution are ripe for review and are virtually identical to takings issue that are arising on literally an every day basis in the mobilehome park industry. WMA's interest in this matter is limited to the second question presented for review. The issue of regulatory takings occurs with an alarming frequency, in the context of mobilehome park regulations in California and other jurisdictions.[1] By granting review this Court can bring some clarity to takings issues that are vexing problems for property owners throughout California and elsewhere.

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1. The undersigned, as counsel for WMA, the Amicus Curiae, have prepared this brief in whole and no person or entity, other than WMA, has made a monetary contribution to the preparation of this Amicus brief.

II. THE INTERSECTION OF WHEN LEGISLATIVE REGULATION OF AN INDUSTRY, SUCH AS THE MOBILEHOME PARK INDUSTRY, HAS REACHED THE POINT OF CAUSING A BURDEN SO AS TO HAVE RESULTED IN A TAKING UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION NEEDS RESOLUTION AND GUIDANCE BY THIS COURT.

Guidance by this court on the question of how a claim of regulatory taking should be analyzed under *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978) is crucial.

Over 100 communities in California alone have adopted some form of mobilehome park rent control. Mobilehome Park Rent Control legislation has, in turn, led to ongoing litigation in California's courts as well as the Federal Courts located in California arising out of the adoption and enforcement of mobilehome park rent control.

By way of example, the following cases represent just a small sample of recently decided state and federal court cases where mobilehome rent control was a central issue. The following list reflects only published opinions. In California the intermediate courts of appeal publish only a small percentage of cases decided and the volume of unpublished cases from California's courts of appeal is actually much higher. In each of the following cases, issues about regulatory takings under the United States Constitution were ultimately at issue.

• *Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal. App. 4th 629.

• *Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651 (9th Cir. 2003).

• *Montclair Park Owners Ass'n. v. City of Montclair*, 264 F.3d 829 (2001).

• *Carson Gardens, LLC v. City of Carson Mobilehome Park Rental Review Board* (2006) 135 Cal. App. 4th 856.

• *Rainbow Disposal Co. v. Escondido Mobilehome Park Rental Review Board* (1998) 64 Cal. App. 4th 1159.

• *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69.

The foregoing list does not include the *Kavanau v. City of Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, and *Galland v. City of Clovis* (2001) 24 Cal.4th 1003 decisions which are rent control cases about takings claims decided by the California Supreme Court.

The Petition for Certiorari filed by Allegretti is singularly appropriate for this Court to accept and address unanswered questions concerning application of this Court's Fifth Amendment cases on regulatory takings because the instant Petition properly raises two (2) preeminent questions that need resolution. First, the Petition for Certiorari properly raises how the phrase "reasonable investment back expectations" should be analyzed by trial courts that are called upon to decide if a taking has occurred under this Court's *Penn-Central* standard (*Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104). There is an alarming absence of guidance from this Court on that issue. The recent *Lingle v. Chevron USA, Inc.* (2005) 544 U.S. 528 decision answered one question about regulatory takings. However, the *Lingle* case, by its very ruling, means that the probability of cases proceeding to trial based upon the *Penn-Central* test increases dramatically.

Second, the Certiorari Petition filed by Allegretti pointedly raises the question that can only be answered by this Court: how trial courts should evaluate whether a regulatory taking has taken place when there remains some economically viable use of the land. In the Allegretti Petition, the landowner/farmer is able to use (farm) approximately one-third of the available land due to the governmental action. And the means of imposing

that limit on land owners pushes the very edge of what regulatory power is properly vested in the County. In rent control situations, the factual situations that arise are very similar. A mobilehome park owner is able to collect some rent and therefore the property does have some economic value. But the economic ability to earn a fair return based on the entirety of the property has been so dramatically cut that the question of when or if the regulation has gone "too far" so as to become a taking, is an ongoing and recurring theme.

The California Supreme Court's decisions in *Kavanau* and *Galland (supra)*, both enunciate the principle that a taking can occur under the California Constitution and the United States Constitution even though there remains some economically viable use of the property. The Certiorari Petition filed by Allegretti should be granted so that those two separate, but interrelated questions can be analyzed by this Court, and so this Court can provide guidance to trial courts and Appellate Courts throughout the Country.

The necessity for this Court to grant the Certiorari Petition of Allegretti is especially relevant in late 2006. In 2005, this Court decided a triumvirate of cases involving Fifth Amendment claims. Two (2) of those decisions have substantial impact on why this Certiorari Petition should be granted. *The Lingle v. Chevron USA, Inc (supra)* decision, discussed briefly above, concluded that the "substantial advancement" test was not an appropriate means of analyzing whether a taking under the Fifth Amendment has occurred. The *Lingle* court strongly confirmed that regulatory takings should be analyzed pursuant to the multi-factor test set forth in *Penn-Central*. The Certiorari Petition of Allegretti provides an opportunity for this Court to help describe how the *Penn-Central* factors should be analyzed and applied in a setting where there is a final decision by the California courts and the issues raised are both factually and legally ripe for review.

The *San Remo Hotel v. City of San Francisco* (2005) 545 U.S. 323, is also of considerable import as to why Allegretti's Certiorari Petition should be granted. The *San Remo Hotel* case dealt with the procedural question of how and when takings claims may properly be filed in Federal Court by property owners. The practical impact of that decision is that cases that raise Fifth Amendment taking claims are now being filed and determined in State Courts more than ever before. That reality means that state Supreme Courts and intermediate appellate courts through-out the country need guidance from this Court on the taking issues raised in Allegretti's Certiorari Petition.

CONCLUSION

For the reasons set forth above, WMA would respectfully submit that this Court should grant the Certiorari Petition filed by Allegretti & Company. The Fifth/Fourteenth Amendment takings claims in the underlying case raise issues which are ripe and do not depend at all on the water law issues that also exist in the *Allegretti v. Imperial County* dispute.

Respectfully submitted,

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